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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

AIR TRANSPORT ASSOCIATION OF AMERICA,
DELTA AIR LINES, INC.,
PAN AMERICAN WORLD AIRWAYS, INC.,
UNITED AIRLINES, INC., AMERICAN AIRLINES, INC.,
NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC.,
AIR CANADA, USAIR, INC. AND EASTERN AIRLINES, INC.,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA; and
VICTOR CALVO, PRISCILLA C. GREW,
RONALD VIAL, LEONARD M. GRIMES, JR.
and WILLIAM T. BAGLEY, the members of
and constituting said Public Utilities Commission,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

A.

In light of the Commerce Clause, the antidiscrimination provisions of the Federal Communications Act of 1934, 47 U.S.C. §§ 201 and 202(a), and the supremacy of that Act in the field of interstate communications, may a state public utilities commission enforce a so-styled "privacy" policy by ordering the telephone companies within its jurisdiction to discontinue all telephone service to the nation's major airlines unless they abandon their undisputably lawful practice of random, quality-control monitoring of calls to their privately owned and operated reservation/information systems, when the record establishes that such a regulation necessarily affects and burdens interstate as well as intrastate telephone communications?

B.

Given the explicit preemption rule of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1), does the Supremacy Clause of the United States Constitution support federal declaratory or injunctive relief against a preempted regulation, even assuming *arguendo* that the Act itself creates no private right of action for affirmative enforcement purposes?

C.

Does the Eleventh Amendment prevent the federal courts from considering the airlines' state law arguments—arguments pertinent to their federal as well as state claims for relief—and determining whether respondents may have been "acting in their official capacities but without any statutory authority," *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 114 at fn. 25 (1984)?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Appendices	iii
Table of Authorities Cited	iv
Petition for a Writ of Certiorari	1
Parties	2
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	12
Conclusion	23

TABLE OF APPENDICES

		Page
Appendix A:	Opinion of The United States Court of Appeals for the Ninth Circuit, *Air Transport Association of America, et al., v. Public Utilities Commission of the State of California, et al.* (Filed November 30, 1987)	A-1
Appendix B:	Order of the United States District Court Northern District of California, *Air Transport Association of America, et al., v. Public Utilities Commission of the State of California, et al.* (Filed June 25, 1986)	B-1
Appendix C:	Order of the United States District Court Northern District of California, *Air Transport Association of America, et al., v. Public Utilities Commission of the State of California, et al.* (Filed October 15, 1986)	C-1
Appendix D:	Memorandum Opinion and Order by the Federal Communications Commission (Adopted September 6, 1985)	D-1
Appendix E:	Judgment by United States District Court Northern District of California, Order of the United States District Court Northern District of California, *Air Transport Association of America, et al., v. Public Utilities Commission of the State of California, et al.* (Filed October 21, 1986)	E-1
Appendix F:	Public Utilities Commission of the State of California: General Order 107-B (Adopted July 1, 1983)	F-1
Appendix G:	Public Utilities Commission of the State of California: Order Modifying Decision (D.) 83-06-021 and Denying Rehearing and Further Modification. (Filed December 15, 1981)	G-1

TABLE OF AUTHORITIES CITED

Cases

Page

Air Transport Ass'n v. P.U.C. of State of Cal., 833 F.2d 299 (9th Cir. 1987) 2

American Trucking Association, Inc. v. P.C.C., 377 F.2d 121, 131 (2nd Cir. 1966), *cert. denied*, 386 U.S. 943 ..13, 15

Ark. Elect. Coop. v. Ark. Pub. Serv. Comm'n., 461 U.S. 375, 394 (1983) 20, 21

Barnes v. Cohen, 749 F.2d 1009 (3d Cir. 1984) 14, 22

Cooney v. Mountain States Teleph. & Teleg. Co., 294 U.S. 384 (1934) 15, 16

Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 90 L.Ed.2d 369 (1986) 16, 17

Metropolitan Life Ins. Co. v. Taylor, 55 U.S.L.W. 4468 (1987) 18

Mitchell v. Forsyth, 472 U.S. ____, 86 L.Ed.2d 411 (1985) 21

Pilot Life Ins. Co. v. Dedeaux, 55 U.S.L.W. 4471 (1987) 18

Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp., 56 U.S.L.W. 4307 (1988) 13, 20

Puerto Rico Telephone Co. v. FCC, 553 F.2d 694 (1st Cir. 1977) 17

Shaw v. Delta Air Lines, Inc., 453 U.S. 85 (1983) 18

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 114 (1984) ..... i, 14, 22

Western Air Lines v. Port Auth. of N.Y. & N.J., 817 F.2d 222 (2nd Cir. 1987), *cert. pending. Solicitor General invited to submit brief*, 56 U.S.L.W. 3383.....13, 20

U.S. Constitution

Eleventh Amendment ..... i, 11, 13, 14, 20, 21, 22

Supremacy Clause ..... i, 13, 20

TABLE OF AUTHORITIES CITED

Statutes

	Page
18 U.S.C. § 2511(2)(a)	5
28 U.S.C.:	
§ 1254(1)	2
§ 1331	7, 20
§ 1337	7, 20
§ 2201	7, 20
§ 2202	7, 20
§ 2342	7, 20
29 U.S.C. § 1144(a)	18
42 U.S.C. § 1983	20
47 U.S.C.:	
§ 151	14-15, 16
§ 152(b)	16
§ 201	*passim*
§ 202(a)	*passim*
§ 402	14, 22, 23
§ 410(c)	16
§ 605	12, 17
49 U.S.C. § 1305(a)(i)	i, 3, 8, 12, 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Air Transport Association of America, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals entered herein on November 31, 1987.

PARTIES

The only parties to the proceeding below are those noted on the caption to this petition.[1]

OPINIONS BELOW

The opinion below is reported as *Air Transport Ass'n v. P.U.C. of State of Cal.*, 833 F.2d 299 (9th Cir. 1987), and is reproduced as Appendix A to this petition. The principal opinions of the District Court and the Federal Communications Commission are included as Appendices B through D, respectively. The judgment sought to be reviewed is included as Appendix E.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on November 30, 1987. A timely petition for rehearing was denied by order filed on January 12, 1988. By order signed on April 4, 1988, Justice O'Connor extended the time for the filing of this petition to and including May 11, 1988. Subject matter jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Federal Communications Act of 1934, 47 U.S.C. § 201(a):

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers,

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[1] A listing pursuant to Rule 28.1 was previously furnished to the Court with petitioners' application for an extension of time to file this petition. No amendments are required at this time.

to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

2. *Id.*, 47 U.S.C. § 202(a):

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

3. Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1):

Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

STATEMENT OF THE CASE

1. The Regulation

The subject of this petition is a regulation promulgated in 1983 by respondent California Public Utilities Commission ("CPUC"). Known as General Order 107-B ("the Order"), it was originally adopted on June 1, 1983 (App. F), and modified on October 19, 1983. (App. G) In sum and substance, the Order as modified threatens the disconnection of all telephone service—interstate *and* intrastate—unless the petitioning airlines

abandon their undisputably lawful pratice of quality-control monitoring of calls to their national flight information and reservation networks.

The Order begins, in pertinent part, with a broad declaration that "Monitoring or recording of telephone conversations shall not be conducted except pursuant to this General Order." (App.F-2) In pertinent part, the Order specifies the two forms of permissible monitoring or recording:

> (a) [When] [a]ll the parties to the conversation give their express prior consent to the monitoring or recording, or
>
> (b) When notice that such monitoring or recording is taking place is given to the parties to the conversation by one of the methods required in this order. (App.F-3)

The required notice must be in the form of an automatic "beep tone" or an operator's verbal announcement to the parties. (App.F-4-5) Either way, the Order effectively prohibits any monitoring or recording of telephone conversations as they would take place in the ordinary course of events, without either party to the call being conscious of the monitoring.

The Order makes no distinction between interstate and intrastate telephone communications. It purports to regulate all communications relying on "the public telephone network" in California (App.G-2), so long as the CPUC has jurisdiction over the utility to which a customer is linked. The Ninth Circuit correctly stated that "[T]he regulation reaches beyond the borders of California . . . " (App.A-3) It reaches far beyond those borders as applied to petitioners. (See *post*, pp. 5-6)

The Order also spells out the drastic implications of noncompliance with the monitoring rule:

> The telephone utility *shall discontinue service* to a customer for non-compliance with this rule if, after written notice of at least five days, the customer has not initiated compliance with such notice. Service will be restored after

> the customer establishes compliance with the rule and pays the reconnection charge. (App.G-2) (emphasis added)

In sum, the Order does much more than reach and regulate interstate (and intrastate) telephone communication by imposition of a local monitoring rule. It actually *cuts off* interstate telephone service as the penalty for noncompliance with the rule.

Interestingly, though, the Order exempts from its prohibition the very practice at issue in this case—but only when performed by a telephone company, not by customers like petitioners:

> Monitoring [covered by the Order] does not include:
>
> * * *
>
> (d) "Administrative monitoring" or "service monitoring" performed by telephone utilities for training and quality control purposes, when performed as authorized by our decision. (App.F-3)

Quality control monitoring is also expressly exempted from the prohibitions of federal law on this subject, 18 U.S.C. § 2511(2)(a). Nonetheless, the CPUC proposes to cut off petitioners' interstate telephone service on the sole basis of their limited monitoring for quality control purposes.

2. The Regulation as Applied

The District Court found the following facts, based on the petitioners' uncontested affidavits in support of their summary judgment motion:

"*Facts*

"Plaintiffs, as part of their operations, operate centralized reservations facilities which provide nationwide reservation services for their customers. Each facility employs a number of reservation agents who, over the telephone, answer customer inquiries as to rates, schedules and services, and make, confirm and forward reservation requests. The reservation centers are part

of an integrated national network which routes calls from all over the country. Because of the integrated design of the system, a caller cannot be certain of reaching a specific facility. For example, a call originating in California may be routed to an East Coast facility even though there is another reservation facility located in or closer to California. This is because the system is designed to distribute calls evenly among the various facilities. When a call is routed to a facility it is taken by the next available agent. Thus, there is no way a caller can make or an agent receive a *personal* call over this integrated system. Separate private telephones are available for non-business calls. The terminal equipment used by airlines is privately owned, though it is naturally connected to the phone lines of the telephone utility. Each plaintiff leases phone lines from the California utility.

"To ensure that their customers receive accurate information and prompt, courteous service, each airline engages in the practice of monitoring a small percentage of the incoming calls (for most it is less than 1% and no airline monitors more than 2% of the calls). The monitoring equipment is privately owned and is connected to the privately owned terminal equipment of the airlines. Each agent is fully aware that the monitoring is being performed by supervisory personnel, though they do not know which specific calls are monitored." (App.C-2-3)

The Ninth Circuit's opinion challenges none of the District Court's factual findings. Indeed, those facts were undisputed by the parties. The issues were decided on cross-motions for summary judgment. (E.R. [Excerpt of Record] 3 and 4)

Several other undisputed facts were not mentioned by the District Court or Court of Appeals. First, the reservation agents are not merely "aware" of their employers' service monitoring. (App.C-3) They are uniformly advised of this practice, as a condition of employment, before they are hired. (C.R. 19)

Secondly, petitioner documented the adverse impacts of compliance with the CPUC's Order. In general, compliance would render it impossible for the nation's airlines to monitor the

competence with which basic flight information and reservation services are being provided to the traveling public. (C.R. 19) Thus, the CPUC's desire to treat all such communications as "private," and prevent even limited quality-control monitoring, will result in a significant detriment to vital transportation and communication services. Furthermore, an inefficient flight information and reservation system cannot help but add significant burdens to airline management, distracting it from other essential functions.

Finally, petitioners' uncontradicted affidavits established that their telephone equipment does not distinguish between interstate and intrastate calls for flight information or reservations. (C.R. 19) All such calls are subject to automatic forwarding anywhere in the country.

3. The Proceedings Below

The Order first went into effect on October 19, 1983, with the adoption of modifications on that date. (See App.G) On November 18, 1983 petitioners[2] filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of California. Federal jurisdiction was premised on 25 U.S.C. § 1331 (federal question) and § 1337 (acts regulating commerce), and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Named as defendants, along with the CPUC and its commissioners, were the two California telephone companies which provided service to petitioners—both privately held, independent corporations. It was they who would actually carry out CPUC's policy by discontinuing service to petitioners.[3]

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[2] All named petitioners herein were plaintiffs below, but two of those plaintiffs were subsequently merged into other petitioners and no longer appear separately.

[3] This indirection in CPUC's policy was necessary because CPUC lacks statutory jurisdiction in California to regulate a private telephone customer's internal business practices. It only has regulatory authority

The complaint asserted a number of different legal challenges to the validity of the Order (E.R. 1, pp. 11-15), including the Commerce Clause; the antidiscrimination provisions of the Federal Communications Act of 1934, 47 U.S.C. §§ 201 and 202(a); the preemption of the field of interstate communications by that Act; the broad prohibition against any state regulations "relating to rates, routes or services of any [interstate] air carrier . . ." contained in the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1); and the lack of any underlying state law authority for the Order.

CPUC and the commissioners[4] answered the complaint on January 9, 1984. (E.R. 2) Although they professed a lack of knowledge and denied that the Order had a necessary interstate impact (Par. 24), their Tenth Affirmative Defense stated as follows:

> Defendant CPUC has jurisdiction to regulate use of local telephone exchanges located in the State of California. (E.R. 2, p. 7)

As events bore out, CPUC was staking out a defense of an inescapably interstate regulation by citing its physical operation within the State of California—essentially arguing that an "intrastate" roadblock could permissibly interfere with an interstate highway.

On April 20, 1984, petitioners moved for summary judgment on all grounds stated in their complaint. (E.R. 3) On June 4, 1984, CPUC and its commissioners filed a combined opposition and cross-motion for summary judgment. (E.R. 4) Their chief contention was that federal law permitted free local regulation of

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over public utilities, and the instant attempt to exceed that authority forms one of petitioners' challenges to the Order.

[4] The telephone company defendants answered as well (C.R. 5), and relief was granted against them in the District Court. (App. E) But they never appealed, the Ninth Circuit did not disturb the injunction against them, and they are not named as respondents to this petition.

the "use" of the public telephone network (E.R. 4, p. 24), and that:

> [The Order] . . . applies to all subscribers equally. Subscribers calling interstate are treated no differently than those placing local calls. (E.R. 4, p. 34)

In other words, the defendants conceded that the Order reached interstate telephone communications. But its effect—including total disconnection—was said to be merely "incidental." (E.R. 4, p. 34)

When the cross-motions came on for hearing on July 9, 1984, the District Court stayed any rulings to give the Federal Communications Commission an opportunity to consider taking jurisdiction of the Communications Act preemption issue. (E.R. 18) In an amicus memorandum (C.R. 52), the FCC suggested referral of that issue, and proceedings were initiated thereon before the FCC on November 23, 1984.

Contrary to its earlier position in the District Court, the CPUC told the FCC that the Order was *not* intended to reach interstate communications:

> True enough, the [FCC] Commission has exclusive authority to regulate the connection of terminal equipment to the public network, but use of such equipment to monitor *intrastate* communications is an entirely different matter. . . . *Properly understood*, therefore, [the Order] cannot be said to substantially affect interstate communication. (CPUC's Comments, pp. 7-8; emphasis added)

Based upon this argument, and without taking evidence, the FCC held that the Order did not infringe upon the FCC's exclusive jurisdiction over interstate communications, finding that it was only intended to regulate the "monitor[ing] [of] intrastate communications . . . " (App.D-6); that there was no federal preemption against regulating "intrastate monitoring . . . " (*id.* at 6); and that the only result of noncompliance with the Order was that

"intrastate telephone service [would] be disconnected." (*Id.* at 8, fn. 14)

Petitioners, who have never challenged CPUC's general right to regulate *intrastate* telephone service (to the extent authorized by state law), saw no purpose in a direct appeal from an FCC opinion saying so, particularly in light of the FCC's confirmation in the decision that its jurisdiction over *interstate* communications was indeed exclusive. But the FCC failed to address any interstate impacts of the Order, accepting CPUC's representation that no such impact was intended. Accordingly, upon renewal of proceedings in the District Court, petitioners asked the court to apply the principles articulated in the FCC's opinion to the facts before the court, showing the undisputed interstate impact of the Order. The District Court proceeded accordingly.

In an initial opinion on June 25, 1986 (App.B), the court first acknowledged what the FCC did not: that "interstate communications will be affected" by enforcement of the Order. (App.B-4) Nonetheless, the court saw too little impact on the interstate system to warrant preemption. (App.B-4-5) As for the Airline Deregulation Act, the court held that the Order had only an "incidental effect" on the airlines, and that the Act only covered "air transportation services, not phone reservation services." (App.B-5) This opinion also summarily rejected petitioners' Commerce Clause and several other challenges, but declined to adjudicate either the state claim or the Communications Act § 202(a) claim, the latter because it also involved state law issues. (App.B-5)

Later, upon reconsideration,[5] the District Court addressed the two remaining claims. First, on the Federal Communications Act claim, it held that petitioners' service monitoring was consistent

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[5] The court had assumed that the California Supreme Court would adjudicate the *ultra vires* issue and the question of whether the monitoring practices violated any provisions of state law (App.C-2), but the state court declined to entertain the petition filed by petitioners.

with all pertinent privacy laws—both civil and criminal, federal and state. Based upon this conclusion, and the clear lack of confidentiality in the subject calls, the court held that the threatened denial of telephone service would violate 47 U.S.C. § 202(a). (App.C-4-6)

On the state law issues, the District Court held that the Order exceeded CPUC's regulatory authority under state law in two respects.[6] Operationally, it reached into "the internal management of a private business over which the [C]PUC had no authority. . . ." (App.C-8) Substantively, "It is not within the power of the [C]PUC to [order utilities to] refuse service to a customer based on otherwise permissible and legal conduct." (*Id.*, p. 9)

On October 21, 1986, based on its conclusions under 47 U.S.C. § 202(a) and state law, the District Court entered judgment declaring that petitioners' service monitoring was lawful, "impair[ing] no constitutional or statutory privacy rights of the airlines' employees or the general public." (App.E-2) It thus concluded that the Order was "invalid and unenforceable as applied to the plaintiff airlines' service monitoring practices. . . ." (*Id.*) The judgment went on to enjoin all defendants from enforcing the Order in that regard. Petitioners' other claims for relief were dismissed.

CPUC appealed to the Ninth Circuit on November 3, 1986. Petitioners cross-appealed on November 6, 1986 from the dismissal of their two preemption claims.

The Court of Appeals issued its opinion on November 30, 1987. It held (1) that the Eleventh Amendment barred any federal court adjudication of the state law *ultra vires* issues; (2) that

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[6] The District Court rejected two threshold challenges to its consideration of the *ultra vires* claim. It rejected CPUC's last minute Eleventh Amendment argument and a res judicata argument based on the California Supreme Court's mere refusal to assume jurisdiction over the remaining issues. (App.C-6-8)

termination of telephone service based upon the airlines' monitoring practices would not violate the access requirements of §§ 201 and 202 of the Communications Act; (3) that the Communications Act preemption argument was waived by petitioners' failure to take a direct appeal from the FCC ruling; and (4) that any preemptive intent in the Airline Deregulation Act was academic because there was no "private right of action under [49 U.S.C.] section 1305(a)." (App.A-12)

As this petition will show, the Court of Appeals' opinion is seriously flawed, conflicts sharply with several other Circuits, and represents a significant threat to fundamental federal policies on interstate communications and airline deregulation. Its rulings effectively immunize from federal control an insidious form of local nullification of those federal policies.

REASONS FOR GRANTING THE WRIT

(1) Overview

Respondent CPUC characterizes its anti-monitoring Order as a modest and exclusively local regulation, well within the states' traditional police powers. The Court of Appeals has now agreed, with a vengeance. The opinion finds a striking similarity in all the federal constitutional and statutory provisions seemingly inconsistent with the Order. It finds that they actually *insulate* the Order from federal court intervention, or even review. "[T]he airlines have not established any basis for the federal courts to interfere in the operation of the state regulation." (App.A-2)

Principally, the opinion—

> (1) finds § 202(a) of the Communications Act to be "primarily" concerned with purely economic discrimination, and subordinated to a supposed intent of § 605 of that Act to give carte blanche to state regulations designed to further "state interests" (App.A-9);

(2) finds the Airline Deregulation Act—a classic case of "federally mandated free-market control," *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 56 U.S.L.W. 4307 (Apr. 19, 1988)—to be lacking in any enforcement authority whatsoever, not even the Supremacy Clause; and

(3) finds the Eleventh Amendment to be an absolute bar to any consideration of the Order's questionable grounding in state law.

On every count, the opinion finds one obstacle or another to the testing of this state regulation in federal court against any of the seemingly applicable federal or state standards. But other Circuits have not felt so constrained. Thus, the important issues herein now call for review in this Court.

(1) The Ninth Circuit's highly restrictive construction of the Communications Act's antidiscrimination rule stands in sharp contrast to the Second Circuit's broad statement, that § 202(a):

> [B]ristles with "any". It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice.

American Trucking Association, Inc. v. P.C.C., 377 F.2d 121, 131 (2nd Cir. 1966), *cert. denied*, 386 U.S. 943. There is surprisingly little case law on this important statute, and the Ninth Circuit has now opened a wide breach in the nondiscriminatory access rule seemingly intended by Congress.

(2) The Ninth Circuit's even more striking construction of the Airline Deregulation Act, denying any federal authority to effectuate it, conflicts with the Supremacy Clause holding of the Second Circuit in *Western Air Lines v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222 (2nd Cir. 1987), *cert. pending, Solicitor General invited to submit brief*, 56 U.S.L.W. 3383; and also with this Court's recent preemption analysis in *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp., supra.* The Airline Deregulation Act is no "pre- emptive grin without a statutory

cat." *Id.*, 56 U.S.L.W. at 4309. It is an explicit preemption rule, which the opinion below has rendered completely hortatory.

(3) The Ninth Circuit's holding under the Eleventh Amendment, barring any adjudication of state law *ultra vires* challenges to the subject regulation, conflicts with the Third Circuit's holding in *Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), at least insofar as the *ultra vires* issues form an element of petitioners' federal claim under 47 U.S.C. § 202(a). Insofar as the *ultra vires* issues from an independent state law claim, however, the Ninth Circuit's opinion takes *Pennhurst supra*, 465 U.S. 89, as rejecting any federal cognizance of such a claim, notwithstanding *Pennhurst*'s explicit statement that it does not so hold. *Id.* at 114, fn. 25. This case squarely presents the Eleventh Amendment issue left open in *Pennhurst—i.e.*, whether the Eleventh Amendment bars claims against state officials acting outside the scope of their state law jurisdiction and authority.

(4) While no other Circuit has passed upon the scope of the direct appeal provisions of the Communication Act in this context, *see* 47 U.S.C. § 402 and 28 U.S.C. § 2342, the Ninth Circuit's treatment of the FCC's limited ruling herein is not merely factually erroneous, but effectively precludes any adjudication of the important preemption issue which the FCC never reached. The FCC's conclusions assumed an exclusively intrastate intent of the Order. This assumption neither warranted nor permitted a direct review addressing the Order's actual interstate impact, as documented in the District Court.

Resolving the Circuit conflicts and settling the law on these issues should command a high priority on this Court's agenda. The Ninth Circuit's opinion has a major national impact, both practical and doctrinal.

(2) Interstate Communication Issues

The most obvious federal interest implicated by the CPUC's Order is the preservation of "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . ." 47 U.S.C.

§ 151. This charter purpose of the 1934 Communications Act is clearly buttressed by its guaranteed access and antidiscrimination provisions:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor .... (§ 201(a))

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services ..., or to subject any ... class of persons ... to any undue or unreasonable prejudice or disadvantage ... (§ 202(a))

But the Ninth Circuit says these provisions relate "primarily" to economics, and that they are perfectly consistent with (1) a public utilities commission ordering a telephone utility to disconnect the interstate telephone service of the nation's airlines because it disagrees with their lawful business practices, or (2) the imposition of potentially conflicting and crippling local regulations upon the airlines' integrated national flight information networks. The issue cries out for a resolution here. The guaranteed access and antidiscrimination statute "bristles with 'any'" in the Second Circuit, *American Trucking, supra*, 377 F.2d at 131, but in the Ninth Circuit it reels from a virtually nullifying construction.

The opinion below also reflects a fundamental lack of appreciation of the nation's strong commitment to an untrammeled interstate communication system. That commitment was first articulated in the Commerce Clause itself, as this Court held in *Cooney v. Mountain States Teleph. & Teleg. Co.* 294 U.S. 384 (1934). The state license tax struck down in *Cooney* simply counted the number of telephone instruments in use, although:

> [T]he same telephones, the same signaling apparatus, the same wires, land, buildings, central office equipment, and operating organization are used in common for all services,

> *interstate as well as intrastate*. . . . And, so far as the instruments are not excepted, the tax is laid indiscriminately with respect to each of these facilities, regardless of the nature of their use. (294 U.S. at 392) (emphasis added)

The obvious conclusion—

> [T]he tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce. (*Id.* at 394

The Order in the instant case taxes telephone service, too, albeit in a different sense. But the instant "tax" is equally "indivisible and indiscriminate" in its application to interstate along with intrastate communications. This fact sharply distinguishes this case from *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 90 L.Ed.2d 369 (1986), wherein state regulation of the depreciation of telephone plant and equipment was upheld, in part because the "separations process" in 47 U.S.C. § 410(c) "literally separates costs . . . between interstate and intrastate, . . . facilitat[ing] the creation or recognition of separate spheres of regulation." 90 L.Ed.2d at 386. Here, to the contrary, as in *Cooney*, the record establishes that there is no such separation between interstate and intrastate communications for the purposes of limiting the Order to the latter.

This case also differs from *Louisiana Public Service Commission* because there is no internal tension on the question presented within the Communications Act. There, the general policy provision (§ 151) was held subordinate to a specific provision (§ 152(b)) barring the FCC from regulating intrastate depreciation. Here, to the contrary, the thrust of the general policy provision is *amplified* by the specific provisions of §§ 201 and 202(a). The latter advance the policy of an efficient nationwide telephone network in a fundamental way: by mandating the provision of interstate service to all who request it (§ 201), and broadly prohibiting any unreasonable discrimination in the provision of that service (§ 202(a)).

There is no doubt, therefore, about whether federal or state authority is "driving the car" on the issue of this case. *Louisiana Public Service Commission, supra*, 90 L.Ed. 2d at 378. Congress itself took the wheel, providing that interstate telephone service simply may not be withheld under an "unreasonably discriminatory" rules or practices. Congress emphatically did not leave this issue to the states. The basic right of access to interstate telephone service is governed by no other authority than the Federal Communications Act itself. "Reasonableness" under the Act is a *federal*, not a state standard. *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977)

Nor is the federally mandated right of access in any way modified by § 605 of the Act, as the opinion below finds. That section, never even mentioned in CPUC's appellate briefs, prohibits unauthorized interception and publication of interstate communications, such as the "pirating" of satelite transmissions. Although a non-preemption provision (§ 605(e)) preserves any other applicable state or federal laws, that hardly injects § 605 into the subject matter of §§ 201 and 202(a), the basic guarantee of access to interstate telephone service.[7] Indeed, § 605 itself creates specific civil and criminal remedies for its violation, and disconnection of service is not among them.

The District Court correctly held that disconnection of petitioners' telephone service based on their lawful quality-control monitoring would violate § 202(a). (App.C-4-6) CPUC's primary defense of the Order was that the monitoring was illegal and, therefore, the disconnection remedy was not "unreasonably discriminatory." (See App.C-4) Thus, the District Court responded with a thorough analysis of the pertinent civil *and* criminal standards of privacy, and aptly concluded that "[W]e are dealing with conversations and practices that all authority and

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[7] This conclusion is particularly appropriate here, where the District Court ruled that the airlines' practices do not violate any provision of California constitutional or statutory law and impair no constitutional or statutory privacy interests.

common sense indicates are not confidential." (App.C-6) Although the Court of Appeals transmuted the District Court's holding into the absurd proposition that states must "criminalize" conduct in order to regulate it validly under § 202(a) (App.A- 7-9), the District Court's actual holding is unassailable and was not addressed by the Ninth Circuit, which refused to rule on the issue. (App.A-9, n.6)

In sum, the CPUC's Order flies in the face of the express provisions of the Communications Act and the Commerce Clause. It impairs petitioners' access to the interstate telephone network solely because of their lawful business practices, and it impermissibly seeks to regulate the interstate communications that Congress has declared to be beyond state regulatory control. In so doing, the Order itself, and the Ninth Circuit's decision approving it, interfere with petitioners' federal rights and impair significant federal interests.

(3) Airline Deregulation Issues

Even if the Order were enforceable against interstate telephone service in general, it would still be unenforceable against the petitioning interstate air carriers. Congress has unequivocally stated its intention to preempt all state laws and regulations "relating to rates, routes or services of any [interstate] air carrier." 49 U.S.C. § 1305(a)(1).

A similar clause exists under the Employment Retirement Income Security Act (ERISA), preempting any state laws which "relate to any employee benefit plan." 29 U.S.C. § 1144(a). That clause preempts not only state laws specifically designed to regulate employee benefits, but any other state laws of general import which have an impact upon such plans. *Shaw v. Delta Air Lines, Inc.*, 453 U.S. 85 (1983); *Metropolitan Life Ins. Co. v. Taylor*, 55 U.S.L.W. 4468 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 55 U.S.L.W. 4471 (1987). This Court specifically noted in *Pilot* the "expansive sweep" of the clause, particularly noting its

application to any state laws "relating to" the subject of the legislation.

The same expansive language is used in the preemption clause of the Airline Deregulation Act. Presumptively, the same meaning should be attributed to the same language used in the same context.

The opinion below first observes, "[a]s an initial matter," (App. A-12) that the Airline Deregulation Act "does not appear" (*id.*) to apply because the Order purportedly does not relate to the rates, routes or services of airlines. Addressing only "services," however, the opinion finds the Act only applicable to services provided by the airlines that are *unique to airlines*:

> The type of telephone operation utilized by the airlines is *not peculiar to airlines*, and is similar to those operations used by other national service industries where reservations are required, such as hotels and motels, and car rental compaines. (App.A-12) (emphasis added)[8]

With respect, this "peculiarity" test would eliminate virtually everything the airlines do from the Act's coverage. Virtually every service provided by interstate air carriers, and each component of that service, is provided by other companies in some manner or another, on a local or interstate basis. The Court of Appeals' rationale would allow state regulation of meal service, cabin interiors, smoking rules, and a wide range of other services provided and equipment used by the airlines, all of which have non-aviation applications as well. Surely, though, Congress intended the Act to cover the *airlines*' provision of these services, and presumably their flight information networks as well.

But the opinion stops short of issuing a "definitive resolution" of that issue. (App.A-12) Rather than gutting the Act's coverage with an outright holding on the "peculiarity" test, the court

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[8] The basis for this statement of fact is not explained. No evidence to support it exists in the record.

elected to emasculate the Act altogether by rejecting any federal authority to block a preempted regulation. The opinion agrees with the Second Circuit that there is no private right of action for affirmative enforcement purposes, but disagrees with the Second Circuit—in the very case cited—that the Supremacy Clause[9] authorizes federal declaratory or injunctive relief against a pre-empted regulation. *See, Western Air Lines v. Port Authority etc., supra*, 817 F.2d 222, *cert. pending* (Docket No. 87-333). Without any recognition of the import of its holding, the court has turned an explicit preemption rule into an unenforceable exhortation.

With apologies to the Solicitor General, *see, Puerto Rico Dept. of Consumer Affairs, supra*, 56 U.S.L.W. at 4309, a pre-emptively growling tiger has just had its teeth extracted. An examination in this Court is clearly warranted.

(4) Eleventh Amendment Issues

Petitioners asserted below, and the District Court agreed (App.C-8-9), that the Order was not even within the scope of CPUC's own regulatory authority. If that is correct, the Order is not only invalid as a matter of state law, but it is all the more indefensible under the Commerce Clause and § 202(a) of the Communications Act. Both of those federal provisions contemplate the balancing of national and local interests. And under the Commerce Clause, at least, the nature of an alleged local interest must be carefully scrutinized at the threshold. Only a "legitimate local public interest," *Ark. Elect. Coop. v. Ark. Pub. Serv. Comm'n.*, 461 U.S. 375, 394 (1983), will qualify for any balancing against the national interest in untrammeled interstate com-

[9] The opinion cites 42 U.S.C. § 1983 in this context, implying that petitioners sought to use that statute as a vehicle for invoking the Supremacy Clause. But petitioners' only mention of that statute, in either court below, was on petition for rehearing, questioning the Court of Appeals' citation to it. Petitioners' jurisdictional allegations were directly under 28 U.S.C. §§ 1331, 1337, 2201 and 2202. (E.R. 1, ¶ 20)

merce. The "unreasonable discrimination" test in the Communications Act presumably operates in the same manner.

It is remarkable, therefore, that the opinion below refuses to adjudicate any of the state law issues in this case. It holds that the Eleventh Amendment bars any consideration of the claim "that the CPUC acted in excess of its state statutory jurisdiction" in promulgating the Order. (App.A-5) This holding was not only applied to petitioners' pendent state law claim, but also to their federal claim under § 202(a) of the Communications Act.[10] The District Court held that the Order's total lack of state law grounding materially undercut the reasonableness of its discrimination in the provision of telephone service. The Court of Appeals, however, while offering some general *dicta* about California's interest in privacy (App.A-12), specifically states that "[W]e are not here deciding issues of state law." (*Id.*, fn. 6) Thus, the opinion simply fails to address the two-pronged *ultra vires* challenge to the Order—that it attempts to regulate nonregulated private businesses, and radically exceeds California's actual privacy principles.

Under both the Communications Act and the Commerce Clause, it seems plain that the federal courts must address and adjudicate substantial *ultra vires* issues if they arise as an element of a federal claim. It is difficult to defend a local interference with interstate telephone communications when the regulation in question is *ultra vires*, bereft of even a prima facie grounding in a "legitimate local public interest." *Ark. Elect. Coop., supra*, 461 U.S. at 394. As a matter of federal law, the balance must strongly tilt in such cases against the local interference with the interstate system.

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[10] The Court of Appeals did not comment on the Commerce Clause, and petitioners did not raise it in that court. They do raise it here, however, as is certainly permissible on a purely legal issue. *Mitchell v. Forsyth*, 472 U.S. ____, 86 L.Ed. 2d 411 (1985)

The Third Circuit has squarely held that the Eleventh Amendment is no bar to the adjudication of a state law issue as an element of a federal claim. *Barnes v. Cohen, supra*, 749 F.2d 1009, 1018-11020. The court distinguished *Pennhurst, supra*, 465 U.S. 89, because it involved only a state law claim for relief. In the instant case, however, the Ninth Circuit likewise cited *Pennhurst*, but declined to rule on the important state law aspects of a federal claim, declaring any such determination to be barred by the Eleventh Amendment. This conflict with *Barnes* should be resolved.

In addition, though, the instant case presents an issue expressly reserved in *Pennhurst*: whether the Eleventh Amendment bars adjudication of a state law *ultra vires* claim as such, not as an element of a federal claim. Pre-*Pennhurst* decisions of the Court had "except[ed] from the Eleventh Amendment bar suits against officers acting in their official capacities *but without any statutory authority*, even though the relief would operate against the State." *Pennhurst*, 465 U.S. at 114, fn. 25 (emphasis added) The Court "question[ed] the continued vitality" of that exception, *id.*, but expressly upheld its continued existence.

Nonetheless, the Ninth Circuit has now held that the Eleventh Amendment bars petitioners' *ultra vires* claim. While there is no current Circuit conflict on this issue, it is manifestly worthy of a grant of certiorari.

(5) The § 402 Direct Appeal Issue

The FCC never reached the question whether the Order was preempted by the Communications Act if it were applied to *interstate* communications. It merely held that the FCC's jurisdiction over interstate communications was exclusive, but that it would not presume an intent by the CPUC to interfere with federal interconnection rights. However, the Ninth Circuit has

held that a direct appeal on that issue, pursuant to 47 U.S.C. § 402, was petitioners' exclusive method for obtaining adjudication of the undecided question—the *actual* scope of the Order as applied to the airlines' national communications systems.

Petitioners concede that an issue actually decided by the FCC, in a ruling otherwise meeting the criteria of § 402, can only be reviewed in the manner there prescribed. But that statute involves *review*. There can be no review of a nondecision, and the statute therefore does not apply to this case. The cases cited by the Court of Appeals simply apply § 402 to cases within its scope; they do not bear on the FCC's opinion in this instance.

An important preemption issue will thus go without any adjudication absent review in this Court. Also, § 402 will be applied in a wholly unprecedented and improper manner.

CONCLUSION

The constitutional and statutory issues in this case well warrant a grant of certiorari. The opinion below exposes petitioners to a significant impairment of their basic federal right of access to the interstate telephone service. The local regulation in question runs afoul of several different federal statutes, both substantive and preemptive, and the opinion below conflicts with several other Circuits. A review in this Court should therefore be granted.

Respectfully submitted,

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APPENDIX A

For Publication

United States Court of Appeals
for the Ninth Circuit

Nos. 86-2885; 2906

D.C. No.
CV-83-5627-AJZ

Air Transport Association of America, et al.,
Plaintiffs-Appellees,

v.

Public Utilities Commission of
the State of California, et al.,
Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Northern District of California
Alfonso J. Zirpoli, District Judge, Presiding

Argued and Submitted
August 13, 1987—San Francisco, California

Filed November 30, 1987

Before: Mary M. Schroeder, Cecil F. Poole and
Alex Kozinski, Circuit Judges.

Opinion by Judge Schroeder

OPINION

SCHROEDER, Circuit Judge:

This case concerns a regulation promulgated by the California Public Utilities Commission. The regulation effectively prohibits telephone customers in California from surreptitiously overhearing or recording conversations without notice to the parties to the conversation. The Commission and its Commissioners (CPUC)

appeal the grant of summary judgment and declaratory relief in favor of the Air Transport Association of America and 13 airlines (ATA), and the issuance of an injunction prohibiting the CPUC from causing the termination of the airlines' telephone service or otherwise enforcing CPUC General Order 107-B (G.O. 107-B) against them.

The principal issues which we must decide in reviewing the district court's judgment are, first, whether the district court erred in holding that the CPUC lacked jurisdiction, as a matter of state law, to issue the regulation and, second, whether the district court erred in holding that G.O. 107-B violated section 202(a) of the Federal Communications Act, 47 U.S.C. § 202(a), on the ground that the regulation requires discontinuance of the airlines' telephone service in an unreasonably discriminatory manner. As additional support for the result below, the ATA argues that relief is justified by general preemption of the field by both the Federal Aviation Act and the Federal Communications Act. We hold that the district court's judgment must be reversed, because we conclude that the airlines have not established any basis for the federal courts to interfere in the operation of the state regulation.

BACKGROUND

In December 1981, the CPUC initiated a rule-making proceeding to determine whether the CPUC should adopt regulations concerning monitoring of telephone conversations by telephone customers who own their own equipment. Over 71 organizations that might be interested were notified and invited to make comments on the issue. The Air Transportation Association of America (ATA) participated on behalf of the airlines. After considering all comments, and denying petitions for rehearing filed by ATA, Pacific Telephone and Telegraph Company, and General Telephone Company of California, the CPUC adopted G.O. 107-B in its present form.

G.O. 107-B defines disapproved monitoring of telephone calls as the use of equipment which allows a third person to overhear or record a telephone conversation without any indication to the conversant parties that they are being overheard, or without

allowing the conversant parties to communicate with the third person. A person wishing to listen in on a conversation without violating the regulation can provide notice by using a beep-tone warning device audible to all parties to the conversation or by announcing to the parties that the conversation is being monitored. The order requires utilities to file tariffs prohibiting monitoring unless notice is given to the parties to the conversation, or their consent is obtained. If a telephone company learns that a customer is monitoring conversations in violation of the tariff, the order requires the utility to discontinue service if the customer does not refrain from such monitoring within five days after notice from the utilities. The customer can file a complaint with the CPUC if discontinuance is threatened, and the customer's service will not be discontinued pending resolution of the complaint.

Rather than appealing the order adopting G.O. 107-B to the California Supreme Court, as provided by Cal. Pub. Util. Code § 1756, the ATA and 13 airlines filed this suit in federal district court. According to the complaint, all but one of the airlines has a telephone reservations facility in California equipped with privately owned automatic call distribution equipment. This equipment receives calls from both within and without California. However, the equipment distributes incoming calls to reservation centers throughout the United States on the basis of reservation agent availability without regard to the place of origin of the customer's call. Thus, calls from California may be routed to reservation agents within or without California, and calls from outside California may be routed to reservations agents within or without California. Thus, the regulation reaches beyond the borders of California, and this is not disputed.

The reason that the airlines monitor conversations between their reservations agents and members of the general public is allegedly to assure that the agents give information accurately, efficiently, and courteously.

In their complaint, they sought relief on the grounds that the CPUC has exceeded its jurisdiction under California law in adopting G.O. 107-B, that G.O. 107-B violates 47 U.S.C. § 202(a) in that it requires discontinuance of service in an unreasonably discriminatory manner, and that G.O. 107-B is

preempted by both the Federal Communications Act, 47 U.S.C. § 151, *et seq.*, and the Federal Aviation Act, as amended by the Airline Deregulation Act of 1978, 49 U.S.C. § 1305.[1] Named as defendants were the CPUC and its Commissioners, Pacific Telephone and Telegraph Company, and General Telephone Company of California. The complaint sought declaratory relief and an injunction prohibiting enforcement of G.O. 107-B.

Shortly after the parties had filed cross-motions for summary judgment, the district court allowed the Federal Communications Commission (FCC) to file an amicus memorandum. Concerned that G.O. 107-B's interstate reach might affect matters within its jurisdiction, the FCC requested the court to stay proceedings and refer the parties to the FCC for consideration of the Federal Communications Act preemption claim. The district court stayed proceedings. ATA then filed a petition with the FCC for a declaratory ruling and expedited relief. This was eventually denied. *In re Petition of Aeronautical Radio, Inc. & Air Transport Association of America*, 102 FCC 2d 1 (1985) (*ATA Petition*). In denying this petition, as well as ATA's subsequent petition for reconsideration,[2] the FCC determined that Congress had given the states authority to provide measures to protect the privacy of telephone conversations, that G.O. 107-B did not bar or restrict subscriber interconnection with the public switched network, that G.O. 107-B did not substantially affect the conduct of an efficient, nationwide telecommunications network, that G.O. 107-B would not have a significant impact on federal interconnection rights, and that access to the interstate network would not unreasonably be denied by G.O. 107-B. ATA did not appeal these determinations.

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[1] The complaint also sought relief on the grounds that G.O. 107-B violated the Commerce clause, U.S. Const., art. I, cl. 3, the fourteenth amendment, and the permanent injunction affirmed by this court in *Hughes Air Corp. v. Public Util. Comm.*, 644 F.2d 1334 (9th Cir. 1981). The ATA does not press these theories on this appeal, and has apparently abandoned them.

[2] *Memorandum Opinion and Order*, FCC No. 86-123 (released March 28, 1986). This opinion and order was not published.

After the FCC ruling, the district court lifted the stay of the action. It then granted summary judgment in favor of the CPUC on all of ATA's federal law claims except the 47 U.S.C. § 202(a) claim. The district court dismissed ATA's section 202(a) claim without prejudice because of its belief that whether the regulation constituted unreasonable discrimination in violation of that section involved a question of state law. It similarly dismissed without prejudice ATA's claim that the CPUC had exceeded its jurisdiction under state law.

ATA then filed an application for leave to file an out-of-time petition for a writ of certiorari in the California Supreme Court to obtain review of its state law claims. The California Supreme Court denied the application for leave without opinion or comment.

ATA then moved the district court to reconsider its order dismissing the section 202(a) and state law jurisdictional claim on the ground that ATA no longer had a forum in which to litigate these claims. The district court construed the motion as one under Fed. R. Civ. P. 60(b)(6) and relieved the ATA from the prior judgment.

The district court then ruled that the CPUC had exceeded its jurisdiction in adopting G.O. 107-B and the G.O. 107-B constituted "unreasonable discrimination" under 47 U.S.C. § 202(a). It granted ATA summary judgment, declaratory relief and an injunction prohibiting the telephone companies, the CPUC, and the Commissioners from enforcing G.O. 107-B or "terminating, threatening to terminate, or causing other parties to terminate the telephone service of the plaintiff airlines because of their supervisory monitoring practices." It is from that ruling that the CPUC appeals.

DISCUSSION

A. Eleventh Amendment

We first consider the district court's holding that the CPUC acted in excess of its state statutory jurisdiction in promulgating G.O. 107-B. CPUC correctly contends that we must hold that the

eleventh amendment prohibits the district court from exercising jurisdiction over ATA's claim that the Commission acted in excess of its state statutory jurisdiction in promulgating G.O. 107-B.

The eleventh amendment, by its terms, prohibits suits brought against a state by a citizen of another state. The Supreme Court has held that the amendment also prohibits suits against a state by citizens of the state sued. *Hans v. Louisiana*, 134 U.S. 1 (1890). The eleventh amendment does not bar suits against a state official for federal constitutional or statutory violations in some situations. *See Ex Parte Young*, 209 U.S. 123 (1908). However, the amendment bars claims in federal court against state officials based on state law violations. *Pennhurst State School & Hospital v. Haldeman*, 465 U.S. 89, 106, 121 (1984).

ATA argues that the CPUC and the Commissioners acted beyond their jurisdiction and that this characterization distinguishes this from other suits against state officials. We perceive no meaningful distinction. Here, as in *Pennhurst*, defendants were acting in good faith and "*within the sphere of their official responsibilities.*" *Pennhurst*, 465 U.S. at 107 (*quoting Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1324 (E.D. Pa. 1978)) (emphasis added by Supreme Court opinion). The essence of their claim is that the state officials violated state law in promulgating G.O. 107-B and will violate state law if they attempt to enforce it. This is thus a claim barred by the eleventh amendment. *Id.*

B. Federal Communications Act

We next turn to the district court's holding that the regulation violates the anti-discrimination provision of the Federal Communications Act, 47 U.S.C. § 202(a). That section provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particu-

lar person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

The district court determined that the type of monitoring proscribed by G.O. 107-B did not violate any statutory provisions of federal or California law.[3] The district court then held that because G.O. 107-B purported to regulate otherwise lawful conduct, it violated section 202(a). It thus interpreted section 202(a) as prohibiting, per se, a state regulatory agency from regulating practices which have not been legislatively declared criminal. We are unpersuaded by ATA's arguments that this is a proper interpretation of sectin 202(a).

ATA has not pointed out, and we cannot discern, anything in the Federal Communications Act, the language of section 202(a), or the legislative history, to supporty its interpretation. The Communications Act establishes, by its terms, a dual system of state and federal regulation over telephone service. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, ____, 106 S.Ct. 1890, 1894 (1986); *California v. FCC*, 798 F.2d 1515, 1517 (D.C. Cir. 1986); *see* 47 U.S.C. §§ 152, 221, 301, 605(e). The Act is concerned with regulating interstate and foreign commerce in and by wire communication to make available worldwide communication services at reasonable charges and to protect the safety of life and property through the use of wire and radio communication. 47 U.S.C. § 151. However, like other statutes prohibiting discrimination in commerce with respect to prices or charges, such as section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, Congress' primary concern in enacting 47 U.S.C. § 202(a) was with economic discrimination, not the complete regulation of an industry for the health and safety of the general public. Congress certainly did not intend section 202(a) to prohibit state regulation of intrastate utilities to protect public health, safety and welfare. *Cf. McDonnell Douglas Corp. v. GTE*, 594 F.2d 720, 723-24 (9th Cir.), *cert. denied*, 444 U.S. 839 (1979) (where state regulates intrastate communications practices within meaning of section 152(b), section 202(a) inapplica-

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[3] The district court considered whether ATA's monitoring practices violated 18 U.S.C. §§ 2510-2520, or Cal. Penal Code §§ 631, 632.

ble): *Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 493 n.7 (D.C. Cir. 1980) (per curiam) (utility's rates for modification of Private Branch Exchange equipment subject to state regulation and not violative of section 202(a)). Moreover, 47 U.S.C. § 605, which affords some federal protection for a telephone user's privacy, provides in subsection (e) that "[n]othing in this section shall affect any right, obligation, or liability under . . . any . . . applicable . . . State or local law." This provision, like section 202(a), does not limit state regulation to criminal statutes.[4]

The only case cited by ATA to support its proposed interpretation is *Palermo v. Bell Tel. Co.*, 415 F.2d 298 (3d Cir. 1969). This case, however, holds only that disconnection for legislatively declared criminal conduct is not unreasonably discriminatory under the statute. It does not hold that criminal conduct is a prerequisite for non-discriminatory regulation. In *Palermo*, the telephone company had cut off the Palermos' telephone service at the district attorney's request after the district attorney learned that Mr. Palermo was using the telephone to violate state gambling and banking laws. The Palermos filed suit seeking restoration of service by way of injunction, contending that discontinuance without notice or a hearing violated 47 U.S.C. §§ 201 and 202. The Third Circuit affirmed the district court's holding that because the telephone company acted reasonably, there was no claim to relief under sections 201 and 202. *Id.*

Insofar as *Palermo* deals at all with a question of statutory interpretation of section 202, the case, at most, stands for the proposition that discontinuance of service based on criminal conduct is not unreasonable discrimination.[5] However, assuming

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[4] Similarly, the legislative history of the wiretapping and eavesdropping provisions contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq., suggests that states may impose more stringent standards to protect their citizens' privacy but does not suggest that states must make the violation of such standards criminal. *See* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, 2181-87.

[5] We find little reason to disagree this proposition, as we intimated as much in *McBride v. Western Union Tel. Co.*, 171 F.2d 1 (9th Cir. 1949).

arguendo that *Palermo* established this proposition, it does not follow as a matter of logic that discontinuance based on less than criminal conduct is unreasonable. Such a theory of section 202(a) is not only unprecedented, but would severely interfere with the ability of state agency to further legitimate state interests, as authorized by 47 U.S.C. § 605(e). In this case the California regulation was promulgated in furtherance of perceived privacy interests of its citizens. In California, a citizen's interest in privacy has been raised to the dignity of an express state constitutional right. *See* Cal. Const. art. I, § 1. California has seen fit to protect this right with statutes providing criminal sanctions for a violation of one's privacy, as well as a statutory civil cause of action for the person whose rights are violated. *See* Cal. Penal Code §§ 630-637.5. The CPUC has also been directed by the California legislature to play a part in ensuring privacy rights. *See* Cal. Pub. Util. Code §§ 7905-06. ATA's theory would prevent any state regulatory authority from effectuating protections for the interests and rights of its citizens unless there was a specific legislative provision criminalizing violations of those interests or rights.[6]

We decline to interpret the Federal Communications Act in a manner which forces states to criminalize all conduct it wishes to regulate through civil enforcement mechanisms. We therefore hold that G.O. 107-B does not require discontinuance of service on an unreasonably discriminatory basis. Our decision in this regard is fully supported by the FCC's decision on ATA's petition for declaratory ruling. The FCC held that G.O. 107-B was unlikely to have a significant impact on customers' federal interconnection rights, and stated in its order denying ATA's petition for rehearing that G.O. 107-B is not unreasonable. ATA has not offered any other arguments that G.O. 107-B is discriminatory. Because the regulation applies to all, it does not appear discriminatory, and it is certainly not discriminatory on any basis other than a neutral and rational one. *See National Ass'n of Reg. Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 113 (D. C. 1984), *cert.*

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[6] We express no opinion on whether California constitutional and statutory privacy protections extend to the conversations engaged in by airline reservation agents and customers because we are not here deciding issues of state law.

denied, 469 U.S. 1227 (1985). We see no reason to hold G.O. 107-B invalid.

ATA next contends that even if we reject its section 202(a) argument, the Federal Communications Act still requires that the district court's judgment be affirmed because the Act occupies the entire communications field so as to preempt state regulation generally, and G.O. 107-B particularly.

The district court initially referred the parties to the FCC to consider this point while staying proceedings on the rest of ATA's complaint. The FCC explicitly considered and rejected ATA's preemption contention, holding that Congress has indicated to the states that they may legislate to protect the privacy of telephone conversations, and that nothing in the Federal Communications Act preempts state legislation in this area. *ATA Petition*, 102 FCC 2d at 5, 6. ATA did not appeal the order dismissing its petition. When the district court lifted the stay, it explicitly rejected the preemption argument, essentially agreeing with the FCC on this point. ATA now contends that this ruling was in error, and provides an alternative ground for affirming the district court's judgment.

We decline to consider the contention because the district court lacked jurisdiction to reconsider the general preemption issue. 28 U.S.C. § 2342 vests exclusive jurisdiction in the courts of appeals to review final orders of the FCC and the Federal Maritime Commissions, as well as other federal agencies. In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), the district court stayed proceedings in a dispute concerning the shifting of fees for cargo that remained on a wharf beyond five days so that the parties could obtain a ruling from the Federal Maritime Commission. The Supreme Court upheld the district court's refusal to consider the issue once the Commission had ruled on it on the ground that 28 U.S.C. § 2342 placed exclusive jurisdiction to review the Commission's order in the court of appeals. *Id.* at 69. The Supreme Court has also held that exclusive jurisdiction to review the FCC's denial of a petition for rulemaking resides in the court of appeals. *See FCC v. ITT World Communication, Inc.*, 466 U.S. 463, 468-69 (1984). Here, once ATA filed a petition for declaratory ruling and obtained an order

denying its petition, the district court lost jurisdiction to consider the preemption issue. 28 U.S.C. § 2342; *ITT World Communications*, 466 U.S. at 468-69; *Marine Terminal*, 400 U.S. at 69. Accordingly, we will not consider the contention.[7]

C. Federal Aviation Act

ATA argues that the district court erred in rejecting its claim that G.O. 107-B is preempted by the Federal Aviation Act, as amended by the Airline Deregulation Act of 1978 and that the judgment can be affirmed on this ground. The provision upon which it relies states:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates,

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[7] This analysis also raises a question as to whether the district court had jurisdiction over ATA's section 202(a) claim. We agree with the parties that the FCC did not consider the particular section 202(a) claim considered by the district court. Although contentions that a regulation or practice is unlawful because unreasonable should generally be referred to the FCC under the doctrine of primary jurisdiction, *see Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945), referral is not required where the issue to be decided is a question of law. *See Great N.R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922); *Klicker v. Northwest Airlines*, 563 F.2d 1310, 1313 (9th Cir. 1977); *ICC v. Big Sky Farmers & Ranchers Coop.*, 451 F.2d 511, 515 (9th Cir. 1971). Because ATA's per se theory of section 202(a) involved only the construction of section 202(a), and incidentially California law, the district court properly retained jurisdiction over the claim, while sending the parties to the FCC to allow that agency to utilize its specialized, technical expertise to determine whether G.O. 107-B would interfere with the development of a rapid and efficient nationwide telecommunications network. To the extent that the FCC considered the issue of reasonableness at all, it did so as a matter of fact, without at all considering whether G.O. 107-B proscribed conduct which was criminal. *See ATA Petition*, 102 FCC 2d at 5. Thus, the district court's determination of ATA's per se claim did not involve a review of the FCC's order and was not prohibited by 28 U.S.C. § 2342.

> routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1305(a)(1).

As an initial matter, G.O. 107-B does not appear to be a regulation "relating to rates, routes or services of any carrier." It clearly does not relate, directly or indirectly, to rates or routes. Nor does the regulation relate to "services" as we considered that term in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415-16 (9th Cir. 1984) (Federal Aviation Act preempts state law which allegedly prohibits airline from requiring all handicapped persons to sit in a specified area of airplane). The type of telephone operation utilized by the airlines is not peculiar to airlines, and is similar to those operations used by other national service industries where reservations are required, such as hotels and motels, and car rental companies. We are presented with nothing in the Deregulation Act or its history indicating that Congress intended totally to preempt state regulation of utilities insofar as such regulation affects airlines.

This is not, however, an appropriate case for the definitive resolution of the scope of federal preemption under the Deregulation Act. ATA's ability to maintain this claim depends upon the existence of a private right of action under section 1305(a). This very contention was considered by the Second Circuit, and we can see no reason to disagree with their holding that 49 U.S.C. § 1305(a) does not create a private right of action. *See Montauk-Caribbean Airways, Inc. v. Hope*, 874 F.2d 91, 97-98 (2d Cir.), *cert. denied*, 107 S. Ct. 248 (1986); *see also Western Air Lines v. Port Auth. of New York and New Jersey*, 817 F.2d 222, 225 (2d Cir. 1987); *petition for cert. filed*, 56 U.S.L.W. 3183 (U.S. Aug. 26, 1987) (No. 87-333). The requisite indicia is lacking in the legislative history of the statute[8] that Congress intended to create a private right of action or remedy under the statute. *See Cort v. Ash*, 422 U.S. 66, 78, 80, 82; *Montauk-Caribbean Airways, Inc.*, 784 F.2d at 97-98. Nor does the law of this circuit permit an offensive challenge to the state regulation as violative of

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[8] *See* H.R. Rep. No. 85-1211, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52.

supremacy clause principles via 42 U.S.C. § 1983 because ATA's claim, to the extent it is not based on 49 U.S.C. § 1305(a), must be considered as being based on federal preoccupation of the field. *See White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 850 (9th Cir. 1984) (amended opinion), *cert. denied*, 107 S. Ct. 940 (1987).

Because there is no basis in federal law for the district court's injunction, its judgment must be reversed and judgment in favor of CPUC on its cross-motion for summary judgment must be granted. In so holding, however, we express no opinion as to the validity of G.O. 107-B under California law, or the availability of remedies under California law.[9] The district court's judgment on the 47 U.S.C. § 202(a) and state law claims is reversed with instructions to vacate the injunction against CPUC. The case is remanded with directions to enter judgment in favor of CPUC on its cross-motion for summary judgment on ATA's 47 U.S.C. § 202(a) claim, and to dismiss the state law claim for lack of jurisdiction. The district court's judgment dismissing the general preemption claims is affirmed.

AFFIRMED in part, REVERSED and REMANDED in part.

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[9] Our disposition makes it necessary to consider CPUC's contention that the California Supreme Court's denial of ATA's application for leave to file a late petition for a writ of certiorari is functionally equivalent to a denial of a petition for certiorari for res jusicata purposes under California law.

APPENDIX B

United States District Court
Northern District of California

No. C-83-5627 AJZ

Air Transport Association of America, et al.,
Plaintiffs,

vs.

Public Utilities Commission of the State of California, et al.,
Defendants.

ORDER

[Filed June 25, 1986]

Plaintiffs are airlines which provide both instate and interstate transportaion services. They seek declaratory and injunctive relief from General Order 107-B ("Order") of the defendant California Public Utilities Commission ("CPUC"), which prohibits them from engagding in the practice of occasional monitoring of phone calls to their reservation facilities for purposes of training and quality control. Plaintiffs make several arguments in support of their contention that the CPUC's Order is invalid, some of which present questions of state law.

In May and June of 1984, the airlines and the CPUC filed cross-motions for summary judgment on all of the various claims in this case. At oral argument on the parties' cross-motions for summary judgment, the court expressed a desire to obtain from the Federal Communications Commission ("FCC") a statement of its opinion on the Federal Communications Act preemption issue raised by the motion. Plaintiffs sought such an opinion from the FCC attorneys who asked the court to "refer the issue to the FCC for its consideration and determination in the first instance."

Based upon this request, the court entered an order on September 10, 1984, staying the action and directing plaintiffs to initiate proceedings before the FCC to obtain a decision on the preemption issue. The court did not rule on any of the other issues. Shortly thereafter, plaintiffs filed a petition with the FCC for a declaratory ruling and expedited relief in which they sought a

declaration that the CPUC's Order infringed upon the exclusive jurisdiction of the FCC. On September 12, 1985, in its initial opinion, the FCC denied plaintiffs' request for declaratory ruling. The FCC confirmed this decision on March 28, 1986 in denying plaintiffs' Motion for Reconsideration.

Facts

As part of their operations plaintiffs operate reservations facilities which provide nationwide reservation services for their customers. With the exception of Eastern Airlines and Capitol Airlines, each plaintiff has at least one of these reservation facilities in California. Each facility employes a number of reservation agents who, over the telephone, answer customer inquiries as to rates, schedules and services, and make, confirm and forward reservation requests. The reservation centers are part of an integrated national network which routes calls from all over the country. Because of the integrated design of the system, a caller cannot be certain of reaching a specific facility. For example, a call originating in California may be routed to an East Coast facility even though there is another reservation center in or closer to California. This is because the system is designed to distribute calls evenly among the various facilities. When a call is routed to a facility it is taken by the next available agent. Thus, there is no way that a caller can make, or an agent receive, a personal call over this integrated system. Separate private telephones are available for non-business calls. The terminal equipment used by the airlines is privately owned, though it is connected to the phone lines of the telephone utility. Each plaintiff leases phone lines from the California telephone utility.

To ensure that their customers receive accurate information and prompt, courteous service, each airline engages in the practice of monitoring a small percentage of the incoming calls (for most it is less than 1% and no airline monitors more than 2% of the calls). The monitoring equipment is privately owned and is connected to the privately owned terminal equipment of the airlines. Thus, the monitoring of calls occurs "after" the transmission "leaves" the lines of the telephone utility. Each agent is fully aware that monitoring is being performed by supervisory person-

nel, though they do not know which specific calls are being monitored. The monitored calls are not recorded.

The Order of the CPUC which plaintiffs challenge provides that no monitoring of calls (either business or personal) shall be permitted to take place unless notice is given that monitoring of each specific call is taking place. The Order specifically requires that "Notice of monitoring shall be given either: a. By a tone warning device which automatically produces a distinct signal audible to all parties to a conversation. The signal shall have those characteristics specified by the Federal Communications Commission, or by this order; or b. By verbal announcement by the operator of monitoring equipment to the parties to a communication . . ." The FCC has not specified any characteristics for tone warning devices. The characteristics specified in the CPUC Order require a tone not less than every 12 seconds nor more than 18. The penalty for non-compliance with the CPUC's Order is discontinuance of phone service by the telephone utility until the customer establishes compliance with the Order and pays a reconnection charge.

Although the Order is not clear on its face, counsel for the CPUC has stated that it applies only to reservation facilities located in California. Thus, the Order does not apply to plaintiffs Eastern or Capitol Airlines since they have no reservation facilities in California.

The Federal Claims

Preemption

Plaintiffs contend that the CPUC Order as applied to the airlines' practice of monitoring the business calls made to their reservations facilities is preempted by the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, and the exclusive jurisdiction of the FCC over interstate communications and threatens the airliness' federal interstate connection rights.

In its initial opinion and upon reconsideration, the FCC found that the CPUC Order was not preempted by the Federal Communications Act because it did not appear to have a significant impact on customer federal interconnection rights:

> The Order does not bar or restrict subscriber interconnections to the public switched network and petitioners have not demonstrated that it substantially affects the conduct of an efficient, nationwide telecommunications network. Petitioners have submitted no evidence that access to services offered under the interstate tariffs have or will be unreasonably denied. Absent such a showing we will not presume California intends to interfere with legitimate federal rights.

It is clear from the record that if plaintiffs violate the Order and service is terminated, interstate communications will be affected because the California reservations facilities are an integral and indivisible part of a national telecommuncations network. However, termination of service is not the issue here. The issue is whether the prohibition of monitoring without notice impermissibly interferes with the creation of a rapid, efficient and nationwide communications system.

The court finds the Order does not impermissibly interfere with interstate communications. The Order does not prohibit the connection of any particular type of equipment, nor is it an attempt to regulate the rates charged for privately owned equipment. Rather, the Order merely seeks to regulate the manner in which whatever private terminal equipment a customer owns is used when that equipment is connected to the lines of the telephone utility. The Order does not conflict with any FCC regulation or policy designed to promote an efficient and unified national communications system. And the giving of notice of monitoring, by itself, is not so disruptive of interstate communications as to be preempted, at least in the absence of any FCC regulation to that effect.

Section 202(a) of the Federal Communications Act

Plaintiffs' second argument under the Federal Communications Act is that the Order subjects them to unreasonable discrimination in their access to the telephone network on the basis of their lawful business conduct in violation of 47 U.S.C. § 202. This provision prohibits local telephone companies from terminating telephone service because of the subscriber's use of the connection unless the use is in connection with criminal activity. The

determination of whether, independent of the Order, the airlines' supervisory monitoring activities are legal under state law is central to a determination of this argument.

Defendants argue that the California Constitution, statutes and case law prohibit the airlines' supervisory monitoring activities. Specifically, defendants rely on California Penal Code sections 631 and 632 which prohibit wiretapping and eavesdropping, the state constitutional right to privacy, a recent California Supreme Court case, *Ribas v. Clark*, 38 Cal.3d 355 (1985), and decisions of the CPUC itself in support of this position. Plaintiffs argue that the monitoring in question is legal under California law.

Given that questions of state law are central to a determination of whether there has been a violation of section 202(a), the court will exercise its discretion not to entertain this claim and will dismiss it without prejudice.

The Federal Aviation Act

Plaintiffs argue that the CPUC's Order is preempted by the Federal Aviation Act of 1958, as amended by the Airlines Deregulation Act of 1978, 49 U.S.C. § 1301 *et seq.* Section 1305 of that Act provides that "no State . . . shall enact or enforce any law, rule, regulation, standard . . . relating to rates, routes or services of any air carrier having authority . . . to provide interstate air transportation." Plaintiffs contend that the CPUC's Order is an impermissible attempt to regulate their "services."

The court finds this argument is without merit. "In interpreting a statute, the [court's] objective is to ascertain the intent of Congress." *Hughes Air Corp. v. Public Utilities Commission*, 644 F.2d 1334, 1337 (9th Cir. 1981). The court does not believe that when Congress enacted the Federal Aviation and Airline Deregulation Act, it intended to preempt every state law or regulation which had some incidental effect upon some aspect of the airlines' business. Rather, the "services" referred to were intended to be air transportation services, not phone reservation services.

Unreasonable Burden on Interstate Commerce

Plaintiffs argue that termination of their phone service would impose a severe burden on interstate commerce. However, as

discussed above, termination of service is not the issue. The issue is whether the prohibition of monitoring without notice imposes an impermissible burden on interstate commerce. The court finds that the CPUC's restrictions on monitoring do not impose any significant burden on interstate commerce. The restrictions are minimally burdensome and apply to all California businesses and so they in no way discriminate against interstate commerce.

Deprivation of Property Without Due Process

Plaintiffs argue that the enforcement procedures specified in the CPUC's Order provide for the possible termination of their telephone service without due process of law. This argument is frivolous. The Order provides for termination of service only after five days written notice from the phone company and no termination will occur if the customer files a formal complaint with the CPUC either contesting its violation of the monitoring restrictions or seeking a special hardship exemption from those restrictions. Thus, by filing a complaint with the CPUC, termination will not occur until after the customer has had a chance to be heard. The fact that the customer has to request a hearing in order to prevent automatic termination of service will not render the procedure constitutionally inadequate.

Deprivation of Right to Free Speech

Plaintiffs argue that the notice of monitoring requirement deprives them of their first amendment right to free speech. The court, however, finds they are not deprived of any first amendment rights by the Order. Plaintiffs are not being prevented from engaging in any commercial speech, they are prevented from monitoring the conversations of others without notifying the parties to the conversation that monitoring is occurring. In any event, states are permitted to regulate the time, place and manner of speech activity, as long as the regulations are reasonable, content-neutral and serve a legitimate state interest. Even if the CPUC's Order does implicate plaintiffs' first amendment rights, the court finds it is a reasonable regulation of the manner in which those rights may be exercised.

The State Claims

Plaintiffs argue that the CPUC exceeded its jurisdiction when it adopted the Order because it has jurisdiction to regulate public utilities, not private business. Plaintiffs argue that in adopting the Order, the CPUC was trying to indirectly regulate what it could not directly regulate. In addition, plaintiffs argue that the Order extends the scope of privacy rights beyond that afforded by the legislature or the California constitution. While plaintiffs' arguments may have some merit, the court will not decide these questions of state law.

"[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627 (1974). The state law issues presented here involve questions of legislative intent and the delegation of powers to an administrative body, as well as an interpretation of the scope of the right of privacy under the California constitution. The resolution of such important issues of state law lies more appropriately within the ambit of the state courts than this court. *Catalano v. Dep't of Hospitals of the City of New York*, 299 F. Supp. 166, 175 (S.D.N.Y. 1969). Since the proper resolution of the state law issues presented involves interpretation of a largely undefined constitutional right as well as the ascertainment of legislative intent as to the scope of the CPUC's jurisdiction, dismissal of the state claims without prejudice is appropriate.

Accordingly,

IT IS HEREBY ORDERED that General Order 107-B is not preempted by the Federal Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, nor by any decisions of the Federal Communications Commission.

IT IS FURTHER ORDERED that plaintiffs' claims under section 102(a) of the Federal Communications Act are dismissed without prejudice.

IT IS FURTHER ORDERED that General Order 107-B is not preempted by the Federal Aviation Act of 1958, as amended by the Deregulation Act of 1978, U.S.C. §§ 1301 *et seq.*

IT IS FURTHER ORDERED that General Order 107-B does not impose an unreasonable burden on interstate commerce.

IT IS FURTHER ORDERED that General Order 107-B does not deprive plaintiffs of their rights without due process of law.

IT IS FURTHER ORDERED that General Order 107-B does not violate plaintiff's right to free speech under the first amendment to the United States Constitution.

IT IS FURTHER ORDERED that plaintiffs' state claims are dismissed without prejudice.

IT IS FURTHER ORDERED that judgment will be entered thirty days from the date of this order.

Dated: June 25, 1986

ALFONSO J. ZIRPOLI
United States District Judge

APPENDIX C

United States District Court
Northern District of California

No. C-83-5627 AJZ

Air Transport Association of America, et al.,
Plaintiffs,

vs.

Public Utilities Commission of the State of California, et al.,
Defendants.

ORDER

[Filed Oct. 15, 1986]

Plaintiffs are airlines which provide both instate and interstate transportation services. They seek declaratory and injunctive relief from General Order 107-B ("Order") of the defendant California Public Utilities Commission ("PUC") which prohibits them from engaging in the practice of occasional monitoring of phone calls to their reservation facilities for purposes of training and quality control. The complaint in this matter asserted claims under the Federal Communications Act, the Federal Airlines Deregulation Act, various constitutional provisions and a number of provisions of the California Public Utilities Code. On June 25, 1986, this court entered an order dismissing plaintiffs' state law claims without prejudice, stating that the resolution of the issues "lies more appropriately within the ambit of the state courts than this court." The court also dismissed with prejudice all of plaintiffs' federal claims *except* that raised under section 202(a) of the Federal Communications Act. The court found that the Act "prohibits local telephone companies from terminating telephone service because of the subscriber's use of the connection unless the use is in connection with criminal activity," and found that the question of whether the airlines' monitoring activities were "lawful" required interpretation of state law.

On June 14, 1986 plaintiffs filed with the California Supreme Court an application for leave to file a petition for writ of certiorari. Defendant filed a memorandum opposing consideration

of the petition. The California Surpeme Court denied the application for leave to file the petition. Plaintiffs now seek reconsideration of the court's dismissal of their federal claim under section 202 and their state law claims on the ground that the court's failure to address these claims would leave plaintiffs with no forum whatever in which to secure an adjudication of these claims.

Under Rule 60 of the Federal Rules of Civil Procedure, a trial court has authority to relieve a party from an order on a number of grounds, including newly discovered evidence, misrepresentation, or any other reason justifying relief from the operation of the order. Plaintiffs argue, and the court agrees that this court's assumption that plaintiffs had a state law forum in which the state issues could be litigated consitutes a sufficient basis on which to base reconsideration of the court's dismissal of their federal and state claims. Th problem of a lack of forum is even more acute with respect to plaintiffs' *federal* claim under section 202(a) because the absence of a state forum, coupled with this court's refusal to address the claim because of its state law elements, means not only that plaintiffs would be denied a federal forum in which to adjudicate their federal claim but would be denied redress in any court.

Defendant argues that reconsideration is not warranted because "no new facts have emerged nor have any circumstances changed which would warrant a finding that General Order 107-B is either in violation of Section 202(a) of the Communications Act or in excess of the PUC's jurisdiction." Defendant, however, does not address the threshold question of the effect a lack of any forum should have on plaintiffs' request. Instead, defendant argues the merits of plaintiffs' claims. This, however, is not the appropriate inquiry because the court never actually addressed the merits of those claims dismissed without prejudice. Thus, the court concludes that reconsideration is appropriate under these circumstances.

Facts

Plaintiffs, as part of their operations, operate centralized reservations facilities which provide nationwide reservation services for

their customers. Each facility employs a number of reservations agents who, over the telephone, answer customer inquiries as to rates, schedules and services, and make, confirm and forward reservations request. The reservations centers are part of an intergrated national network which routes calls from all over the country. Because of the integrated design of the system, a caller cannot be certain of reaching a specific facility. For example, a call originating in California may be routed to an East Coast facility even though there is another reservation facility located in or closer to Calfornia. This is because the system is designed to distribute calls evenly among the various facilities. When a call is routed to a facility it is taken by the next available agent. Thus, there is no way a caller can make or an agent receive a *personal* call over this integrated system. Separate private telephones are available for non-business calls. The terminal equipment used by the airlines is privately owned, though it is naturally connected to the phone lines of the telephone utility. Each plaintiff leases phone lines from the California utility.

To ensure that their customers receive accurate information and prompt, courteous service, each airline engages in the practice of monitoring a small percentage of the incoming calls (for most it is less than 1% and no airline monitors more than 2% of the calls). The monitoring equipment is privately owned and is connected to the privately owned terminal equipment of the airlines. Each agent is fully aware that the monitoring is being performed by supervisory personnel, though they do not know which specific calls are being monitored.

The Order of the PUC which plaintiffs challenge provides that no monitoring of calls (either business or personal) shall be permitted to take place unless notice is given that monitoring of each specific call is taking place. The Order specifically requires that "Notice of monitoring shall be given either: a. By a tone warning device which automatically produces a distinct signal audible to all parties to a telephone conversation . . .; or b. By verbal announcement by the operator of monitoring equipment to the parties to a communication . . ." The penalty for noncompliance with the Order is discontinuance of phone service by the

telephone utility until the customer establishes compliance with the Order and pays a reconnection charge.

The procedures for enforcement of the Order provide that if there is a dispute between the utility and a customer as to whether the customer has violated the Order or if a customer desires special relief form the Order, the customer may file a formal complaint with the PUC. During the time such complaint is pending, the utility may not terminate service for noncompliance.

Prior to the enactment of the Order, the PUC had required notice of monitoring to be given whenever a customer used terminal equipment supplied by the telephone utility. Because plaintiffs in this case own their own terminal equipment, the previous orders of the PUC concerning monitoring did not apply to them. In order to eliminate what the PUC called a "loophole," the PUC issued the Order now being contested. Because the PUC only has authority to regulate public utilities and the use of the public telephone network, not private companies, the PUC could not issue an order directly prohibiting plaintiffs from engaging in monitoring. Consequently, the PUC's order requires the telephone company to cut off service to noncomplying customers.

Section 202(a) of the Federal Communications Act

Plaintiffs argue that the Order subjects them to discrimination in their access to the telephone network on the basis of their lawful business conduct in violation of Section 202(a) of the Federal Communications Act. Section 202(a) prohibits telephone companies from engaging in any *unreasonable discrimination* in connection with the provision of communication services.

Defendants argue that the Order does not unreasonably discriminate against plaintiffs because all subscribers are treated similarly and only those who engage in illegal conduct under the California Penal Code face a loss of service. Plaintiffs argue that the prohibited conduct is lawful under both California and Federal law and therefore the Order subjects them to unreasonable discrimination.

California Penal Code Section 631 makes wiretapping unlawful. Section 632 makes unlawful the eavesdropping on or record-

ing of confidential communications. Confidential communication is defined as any communication carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined to the parties thereto. Defendant argues that the service monitoring involved in this case is prohibited by these Penal Code sections.

The court is of the view that these Penal Code sections are inapplicable to the calls at issue is this case. Calls to a business entity to obtain public, commercial information and to impart requests to the entity rather than a specific person are not "confidential communications" within the scope of constitutional and statutory privacy interests under either federal or state law. In *Moore v. Telfon Communications Corp.*, 589 F.2d 959 (9th Cir. 1978), the Ninth Circuit held that communications between two business associates were not confidential within the meaning of Penal Code Section 632 because the information was recorded during the course of the parties business relationship and not considered confidential. In fact the information was subsequently related to other officers and employees. And in *Simmons v. Southwestern Bell Tel. Co.*, 452 F.Supp. 392 (W.D. Okla. 1978), the court held that the telephone company's monitoring of business calls for quality control purposes did not violate the plaintiff's right of privacy. "As plaintiff knew his calls were monitored, he had no reasonable expectation that his calls would remain private." *Id.* at 396. *See also Rogers v. Ulrich*, 52 Cal.App.3d 894, 899-900 (1975).

Plaintiffs also cite to prior opinions of the PUC which they argue hold that service monitoring is legal and does not impair any existing constitutional or statutorily protected privacy interests. (See Plaintiffs' supplemental brief pages 17-19). Defendants, however, argue that plaintiffs have misquoted these PUC decisions and taken them out of context. (See Defendants' reply to plaintiffs' supplemental brief pages 8-11). The court will not consider these arguments in detail because it can reach a decision without sifting through these PUC opinions.

In support of its argument that service monitoring violates the Penal Code, defendants cite a recent California Supreme Court case, *Ribas v. Clark*, 38 Cal. 3d 355 (1985). However, the court

believes that *Ribas* is inapplicable to this case. *Ribas* involved a third party listening to a *private* conversation between a husband and a wife over an extension to the wife's private telephone. It did not involve a business call to a company by a person seeking information from the company through whomever answered, and who intended any information provided to be relayed to others in the company. The conversation in *Ribas* was presumed to be private and confidential, and the only issue was whether an extension phone fell within the technical ambit of the wire-tap statute. Furthermore, the decision itself is replete with language indicating that the intention of the Penal Code's provisions is to restrict third party intrusions into *confidential* communications.

The conversation in *Ribas* was admittedly a confidential one and thus has little application here where we are dealing with conversations and practices that all authority and common sense indicates are not confidential. It is hard to see how either the airline operator or the caller have any expectation of confidentiality in their communications; the operator is warned that calls might be monitored (as in *Simmons* and *Briggs v. American Air Filter Co.*, 630 F.2d 414 (5th Cir. 1980), and neither the operator nor the caller have any control over the routing of the call. Thus, the parties could not expect to nor conduct a personal call such as that involved in *Ribas*.

State Law Claims

Defendants argue that the doctrine of *res judicata* precludes any further proceedings in this court on the state law claims. This argument is based on the assumption that a denial of a petition for certiorari by the California Supreme Court constitutes a decision on the merits. *See Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 600 F.2d 1309, 1311-1312 (9th Cir. 1979); *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920) (Where California Supreme Court denied applications for writs of certiorari, decision is tantamount to a decision of the court that the orders and decisions of the PUC did not exceed its authority or violate any right of petitioners. Such a determination is conclusive of the rights of petitioners.) However, as plaintiffs point out, this fact (even assuming it to be true) is beside the point. No petition for certiorari ever was filed by plaintiffs because

the California Supreme Court denied their application for leave to do so. Thus, the court did not rule on the proposed petition on *any* ground. The court's ruling was simply a discretionary refusal to assume jurisdiction over the matter.

Defendants also argue, for the first time in this litigation, that plaintiffs' state law claims are barred by the eleventh amendment, relying on the decision of the United States Supreme Court in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* involved a claim that state officials violated state law by not complying with specific obligations imposed by a state statute. The Court held that the eleventh amendment bars a suit against state officials when the State is the real, substantial party in interest even under the doctrine of pendant jurisdiction. The Court refused to adopt the dissenters' view that an allegation that official conduct is contrary to a state statute would suffice to override the State's protection from injunctive relief under the eleventh amendment because such conduct is ultra vires the official's authority.

Pennhurst, however, is distinguishable from this case. Plaintiffs in this case are not asserting that defendants' conduct is contrary to a state statute. Rather, plaintiffs allege that in requiring the telephone companies to terminate plaintiffs' telephone service because of plaintiffs' "lawful conduct," the PUC and its officials are acting beyond their authority and jurisdiction under state law. The only relief sought is declaratory and prospective injunctive relief. The eleventh amendment does not bar such "an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority . . ." *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982). The Court in *Treasure Salvors* noted that where it was not alleged that the government official had exceeded his statutory authority, an action would be barred by sovereign immunity. Thus, as to plaintiffs' state law claims, the eleventh amendment will not constitute a bar to this court's jurisdiction.

Plaintiffs do concede, however, that *Pennhurst* "probably makes pendent jurisdiction against the PUC itself questionable on the purely state law claims. Under *Treasure Salvors*, however, the claims against the individual commissioners for acts beyond their

jurisdiction and authority still may be maintained, at least with respect to prospective injunctive relief—the only relief sought in this matter." And this court should not be barred from adjudicating plaintiffs' state law claims against the telephone company defendants, who are not protected by the eleventh amendment.

Plaintiffs' state law claims assert that because the Order adopted by the PUC seeks to regulate the internal mangement of a private business over which the PUC has no authority, it is an exercise of authority beyond the PUC's jurisdiction under the laws of the State of California, as set forth in California Public Utilities Code sections 701, 1702, 7905 and 7906.

Section 701 of the Utilities Code provides that the PUC may supervise and regulate "every public utility in the state," and that the PUC may do all things "which are necessary and convenient in the exercise of such power and jurisdiction." Plaintiffs argue that the PUC's authority under this section extends only to regulation of public utilities and not private businesses, a limitation which defendants appear to accept. *See* Pub. Util. Code section 1702, which provides that while the PUC is empowered to entertain a complaint from almost anyone, the only defendants which may be named in a complaint before the PUC are public utilities.

Plaintiffs argue that recognizing that it had no authority to regulate the management practices of private businesses which do not use utility equipment, the PUC attempted to do indirectly what it could not do directly; the PUC structured a rule making telephone companies surrogate enforcers by mandating that the phone companies terminate service to any business operating in a manner that is contrary to the PUC's Order.

The PUC argues that the Order does not represent an attempt by the PUC to regulate privately owned terminal equipment but rather only represents a regulation of the use of the public telephone network in California under authority of section 701 of the Utilities Code. The PUC asserts its jurisdiction for the Order under sections 7905 and 7906 of the Utilities Code. Section 7906 empowers the PUC to "make inquiry of every telephone corporation under its jurisdiction to determine whether . . . such corpora-

tion is taking adequate steps to insure the privacy of communications over such corporation's telephone communications system." Defendants argue that the Order reflects a comprehensive policy regarding the right to privacy in telecommunications.

Defendants' argument is premised on the assumption that service monitoring violates some rights of privacy and is illegal under the California Penal Code. As discussed above, the court is of the view that the monitoring involved in this case is legal under both California and Federal law and therefore rejects defendants' argument. It is not within the power of the PUC to refuse service to a customer based on otherwise permissible and legal conduct. *See* Pub. Util. Code section 7904 which provides that the only circumstances under which a telephone utility may refuse service to a customer is for non-payment of properly incurred charges, or where the use of the telephone is for an illegal purpose. *See also People v. Brophy*, 49 Cal.App.2d 15 (1942) ("Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate public or private conduct of those who seek service at their hands.")

Accordingly,

IT IS ORDERED that General Order 107-B as it relates to the service monitoring practices of plaintiffs constitutes "unreasonable discrimination" under Section 202(a) of the Federal Communications Act in that it prohibits otherwise lawful conduct on the part of the airlines.

IT IS FURTHER ORDERED that General Order 107-B as applied to the service monitoring practices of the airlines is in excess of the jurisdiction of the PUC.

IT IS FURTHER ORDERED that defendant Commissioners and telephone companies are enjoined from terminating plaintiffs' telephone service because of their lawful supervisory monitoring practices.

Plaintiffs are directed to submit an appropriate form of judgment.

Dated: October 15, 1986

ALFONSO J. ZIRPOLI
United States District Judge

APPENDIX D

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Petition for Declaratory Ruling
and Expedited Relief filed by
Aeronautical Radio, Inc. and the
Air Transport Association of America

Memorandum Opinion and Order

Adopted September 6, 1985 Released September 12, 1985
By the Commission: Commissioner Rivera not participating.

1. Before the Commission is a petition for declaratory ruling and expedited relief filed by Aeronautical Radio, Inc. (ARINC) and Air Transport Association of America (ATAA)[1] requesting that this Commission find unlawful an order of the California Public Utilities Commission (CPUC) that regulates service monitoring practices of private businesses.[2] Comments were received from the State of California (California), The Associated Telephone Answering Exchange, Inc. (ATAE) and the North American Telecommunications Association (NATA). The petitioners have replied. For the reasons discussed below, the petition is denied.

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[1] ARINC states it is the communications company serving the air transport industry by providing a variety of communications services on a non-profit basis. ATAA states it is the trade association of the nation's certificated carriers.

[2] Service or supervisory monitoring is the practice, used by employers of listening in on business conversations between employees and customers for business reasons such as training and quality control, to identify sources of customer complaints, and to help determine the most capable employees for promotion. Although the California order in question also regulates recording of telephone conversations, the petition addresses only the service monitoring aspects of the order. We do not here consider the recording aspects of the California order.

Background

2. The investigation which led to adoption of CPUC's General Order 107-B (hereafter "the Order"), was initiated by a complaint filed by an employee of Western Airlines, Inc. (Western). The employee alleged that Western had conducted service or supervisory monitoring over privately-owned terminal equipment without first providing proper notice to the employee. In dismissing the complaint, CPUC cited its lack of authority over the business practices of subscribers of telephone services. It noted that the local telephone carrier had no physical control over the subscriber's privately-owned equipment nor any duty to inspect, supervise or regulate service monitoring on privately-owned terminal equipment. *CPUC Decision No. 93839* (December 15, 1981). Nevertheless, the CPUC instituted an investigation into the desirability of promulgating a rule "regulating monitoring of telephone conversations by customers . . . who own or otherwise provide their own terminal equipment." *CPUC Order Instituting Investigation-Rulemaking 103* (December 15, 1981). The CPUC proposed a rule it stated was intended to ensure privacy as it existed before the widespread use of independently-furnished terminal (PBX) equipment. The final rule was adopted on June 1, 1983. As amended by an order adopted October 19, 1983, it provides that:

> (a) A customer with his own terminal equipment and who monitors calls must provide notice of such practice through one of the CPUC's authorized methods for equipment provided by the telephone company (open transmitter or beep-tone);[3] and
>
> (b) Upon learning of monitoring or recording not in accordance with the CPUC regulation, the telephone company will notify the customer that unless the customer

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[3] In addition to the general rule requiring notice, the Commission adopted a rule requiring each telephone utility to file a tariff that provides that as a condition "of use of the telephone network" each customer must give notice of monitoring.

discontinues such practices, the company shall discontinue service.

The CPUC order also provides that a customer disputing that he is in violation of the CPUC rules or desiring "special relief" from the rule "by reason of special hardship or impossibility of compliance" may file a formal complaint with the CPUC. Finally, the order provides that a telephone company "shall not, by taking action pursuant to this rule, be liable for any loss, damage, or injury, established or alleged, which may result or be claimed to result therefrom."

3. After the CPUC Order was adopted, a number of airlines and the ATAA brought suit in the United States District Court for the Northern District of California seeking a declaratory judgment that the Order is invalid and unenforceable. *Air Transport Association of America v. Public Utilities Commission of the State of California*, No. C-83-5627-AJZ (N.D. Cal. filed November 18, 1983). The plaintiffs also requested a permanent injunction enjoining the defendants from enforcing the Order "or any other order seeking to regulate the services of the airline in excess of the CPUC's jurisdiction."

4. An *amicus curiae* memorandum was filed by this Commission in the District Court on September 5, 1984, asking the court not to address the substantive issues regarding regulation of service monitoring because the Order on its face appeared broad enough to affect matters within the regulatory authority of the FCC. Accordingly, an order staying proceedings in the District Court case was entered on September 10, 1984, pending a final decision by this Commission determining whether the CPUC regulation at issue is preempted by federal authority. The instant petition is brought pursuant to that order.

The Petition and Comments

5. ARINC and ATAA claim that the CPUC service monitoring rule may adversely affect both the internal communications operations of the air transport industry and its external communications with the traveling public. They maintain that it is essential

to both operations that calls be monitored. As to the internal operations ARINC explains there is a central communications center near San Francisco, California which receives calls from domestic and international aircraft. Emergency communications which require direct pilot access to technical support in order to land aircraft safely are handled by the center through the public switched network. The parties claim monitoring of these conversations is required by the FCC[4] and the Federal Aviation Administration requires that they be recorded.[5] ARINC and ATAA argue that the nature of these conversations prevents the express prior consent of all parties.

6. With regard to the traveling public, petitioners explain that there are regional or centralized reservation centers that provide an essential, integrated component of the airlines' interstate network, allowing automatic routing of calls from one center to another when the first is busy or closed. Calls are routed from the network at the point where the privately owned equipment connects to the network and are processed through "automatic call distribution" equipment, which automatically routes them to a reservation agent.[6] Petitioners maintain that airlines do not differentiate between calls which originate inside of California and those which originate outside of the state.

7. In order to ensure that its agents are providing high quality service to its customers, the airlines monitor a small percentage of incoming calls.[7] Petitioners report that the agents employed by the airlines are made aware of the practice of service monitoring

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[4] *See* 47 C.F.R. § 87.75.

[5] 14 C.F.R. §§ 121.343, 121.711. These sections contain regulations requiring the recording and storing of radio communications between pilots and air carriers and all data received by the aircraft flight recorders.

[6] According to ARINC and ATAA, most telephone equipment used at airlines reservations centers is privately owned rather than leased from a telephone carrier.

[7] The petitioners report that the proportion of calls monitored by most airlines is less than 1% and in no case more than 2%.

at the time they are hired and are fully aware that any incoming call could be monitored by supervisory personnel.[8] They further state that service monitoring is confined to incoming calls directed to the airlines as a business entity and not to any individual, and occurs on the airlines' property after the call has left the telephone company facilities. Employees are forbidden from making personal calls over the system, and the random assignment of calls makes it virtually impossible for a caller to reach a specific agent. It is the petitioners' position that customers calling an airline, and not a particular person, do not have their privacy invaded by service monitoring. They maintain that customers are calling an airline, that the monitoring is being conducted by the airline itself and, therefore, the caller obviously has no expectation that his conversation will not be heard by the airline. The petitioners conclude that service monitoring has no relationship to the privacy interest of either the customers who call the airline or the agents employed by the airline. Petitioners contend the CPUC rule: 1) impermissibly regulates interstate communications; 2) violates the FCC's primacy in authority over the terms and conditions governing interconnection of customer-provided equipment by restricting use of equipment that does not cause harm;[9] and 3) leads to an impossible situation of multi-state regulation.

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[8] ATAE, the international trade association for the live telephone answering service industry, reports that its members monitor calls between operators and callers to ensure that operators are performing their duties in an acceptable manner. Calls may also be recorded, ATAE states, to ensure accuracy of the messages and to enable customers to monitor how their calls are being handled.

[9] NATA is concerned that the designation of telephone carriers as enforcers of California's privacy policy creates opportunities for carrier discrimination against users of independently-supplied CPE and therefore undermines the Commission's long-established competitive policies. Furthermore, NATA states, even if the CPUC rule is lawful, California's privacy policy is totally at odds with the principle that "when a customer connects its own PBX, the telephone company's responsibility ends at the point of connection unless the connection causes harm to the system." *Com Services, Inc. v. Murraysville Telephone Co.*, 87 F.C.C. 2d 664, 666 (1981), *citing* Third Report in Docket No. 19528, 67 F.C.C. 2d 1255, 1257 (1978); 47 C.F.R. § 68.108.

8. In response, the CPUC explains that its Order followed a directive by the California Legislature, under Section 7905 of the Public Utilities Code, that telephone companies maintain records of any monitoring devices which they discover and determine whether those entities engaged in monitoring are ensuring the privacy of telephone conversations. The CPUC reasons that privacy can only be ensured by providing notice to both parties to a call that the call is being monitored, recorded or otherwise intercepted. The CPUC states that it has established an exception to the notice requirement for monitoring conducted by telephone companies for purposes of administration, supervision and maintenance, that an exception for airlines is not mandated by the California Penal Code (as is the exception for the telephone carriers), and that creation of such an exception would render meaningless the right of privacy the Order intends to protect. The CPUC further states that airlines are not precluded from using the public network; they are simply required, like all other subscribers, to give notice when this use is accompanied by monitoring.[10]

9. Furthermore, the CPUC argues that state restrictions on monitoring constitute a legitimate regulation of intrastate service and that the rules do not "substantially affect interstate communications." While it recognizes that the Federal Communications Commission has exclusive jurisdiction over the connection of terminal equipment to the interstate network, it maintains that use of this equipment to monitor intrastate communications is a matter of local concern and is properly left to state regulation. The CPUC contends that the right to interconnect terminal equipment to the public switched network does not preempt states from regulating intrastate monitoring. It denies that its Order conflicts with any decision of this Commission.

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[10] The CPUC suggests two methods for the airlines to avoid interruption of service. First, the airlines could inform their employees that all incoming calls are subject to being monitored and then limit the monitoring to the employees' end of the call, excluding the caller's end; or second, they could provide an introductory recorded message to all incoming callers that their calls are subject to being monitored.

Discussion

10. Federal law preempts state law when 1) Congress has expressed a clear intent to preempt state law, 2) Congress has legislated comprehensively to occupy an entire field of regulation or 3) state law actually conflicts with federal law or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congrees.[11] In the field of telecommunications, Congress has given this Commission broad and plenary authority over interstate communications by wire and radio. 47 U.S.C. §§ 151, 152(a).[12] However, Congress has specifically indicated that the states, if they wish, may enact local laws to protect the privacy of telephone conversations, so long as the minimum standards reflected in federal statues are met.[13] *See* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) *reprinted* 1968 U.S. Code Cong. & Ad. News 211, 2181-2187; *State v. Hanley*, 605 P. 2d 1087 (1979), *on rehearing*, 608 P. 2d 104 (Mont. 1980); *People v. Conklin*, 522 P. 2d 1049, 1057 (Calif. 1974), *appeal dismissed*, 419 U.S. 1064 (1974). Moreover, it appears unlikely that the CPUC regulation will have a significant impact on customers' federal interconnection rights.[14] Accordingly, and particularly in

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[11] *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984); *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1984); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

[12] *See, e.g., National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, (D.C. Cir. 1984) (Interstate communications are totally entrusted to the FCC).

[13] We express no view herein concerning whether the business monitoring engaged in by the airline industry meets federal requirements regarding "private" surveillance of telephone conversations. *See* 18 U.S.C. §§ 2510-2520; *see generally Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414 (5th Cir 1980) and cases cited therein concernig the "ordinary course of business exception" contained in the Ominbus Crime Control and Safe Streets Act.

[14] Although the Commission has rules and decisions governing the right of customers to interconnect equipment that is privately beneficial and not publicly detrimental, the CPUC's actions do not preclude or restrict interconnection. There is no FCC registered terminal equipment

light of Congress' recognition of a legitimate state interest in this area, we conclude that federal preemption is not warranted.

Conclusion

11. Accordingly, IT IS ORDERED, That pursuant to Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 154(j), § 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Commission rule 1.2, 47 C.F.R. § 1.2, the petition for declaratory ruling filed by Aeronautical Radio, Inc. and the Air Transport Association of America IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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that may not be connected as a result of the California order. Only if the equipment is used in a manner that California has found to be contrary to public policy would intrastate telephone service be disconnected. *See also Diamond Intern. Corp. v. FCC*, 627 F. 2d 489, 493 (D.C. Cir. 1980), (Commission decision to refrain from exercising jurisdiction upheld where there is no substantial effect on conduct or development of interstate communiciations.)

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-5627 AJZ

Air Transport Association of America, Western Airlines, Inc., Delta Airlines, Inc., Republic Airlines, Inc., Pan American World Airways, Inc., United Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., Pacific Southwest Airlines, Air Canada, Air California, Capitol Air, Inc., Eastern Airlines, Inc.,

Plaintiffs,

v.

The Public Utilities Commission of the State of California; Victor Calvo, Priscilla C. Grew, Donald Vial, Leonard M. Grimes, Jr. and William T. Bagley, the members of and constituting said Public Utilities Commission; Pacific Telephone & Telegraph Company; and General Telephone Company of California,

Defendants.

JUDGMENT

[Filed Oct. 21, 1986]

Based upon the parties' cross-motions for summary judgment, the absence of any disputed issues of material fact, and this court's orders of June 25, 1986 and October 15, 1986,

IT IS ORDERED, ADJUDGED AND DECREED that the motions of plaintiffs Air Transport Association of America, Western Air Lines, Inc., Delta Air Lines, Inc., Republic Airlines, Inc., Pan American World Airways, Inc., United Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., Pacific Southwest Airlines, Inc., Air Canada, Air California, Capitol Air, Inc., and Eastern Airlines, Inc. (hereinafter the "plaintiff airlines") for summary judgment on their claims for declaratory and injunctive relief protecting their rights under Section 202(a) of the Federal Communications Act and certain provisions of the California Public Utilities Code (P.U.C. §§ 403,

701, 1702 and 7904) are granted, and the motions of defendants The Public Utilities Commission of the State of California and its Commissioners on said claims are denied. Accordingly,

IT IS DECLARED that the existing supervisory monitoring activities of the plaintiff airlines are lawful under California and federal law and impair no constitutional or statutory privacy rights of the airlines' employees or the general public.

IT IS FURTHER DECLARED that General order 107-B of The Public Utilities Commission of the State of California, as adopted by Decisions 83-06-21 and 83-01-90, is invalid and unenforceable as applied to the plaintiff airlines' service monitoring practices in that it:

(a) unreasonably discriminates against the plaintiff airlines by threatening to deny them access to the telephone network because of their lawful conduct, and thereby violates Section 202(a) of the Federal Communications Act; and

(b) exceeds the authority and jurisdiction of the Public Utilities Commission of the State of California.

IT IS THEREFORE ORDERED that defendants The Public Utilities Commission of the State of California, Victor Calvo, Priscilla C. Grew, Donald Vial, Leonard M. Grimes, Jr. and William T. Bagley, the members of and constituting said Public Utilities Commission, Pacific Bell, and the General Telephone Company of California, together with their officers, agents, servants, employees and successors, are permanently enjoined from

(a) taking any action to enforce General Order 107-B, as adopted by Decisions 83-06-21 and 83-10-90 of The Public Utilities Commission of the State of California, based upon the plaintiff airlines' supervisory monitoring practices;

(b) terminating, threatening to terminate, or causing other parties to terminate the telephone service of the plaintiff airlines because of their supervisory monitoring practices.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' motions for summary judgment on the remaining claims raised by the complaint are denied, and the

motions of The Public Utilities Commission of the State of California and its Commissioners on said claims are granted, the court finding no legal basis for relief on siad claims on the facts presented to it. Accordingly, said claims are dismissed.

The parties shall bear their own costs.

DATED: October 21, 1986

/s/ ALFONSO J. ZIRPOLI
United States District Judge

APPENDIX F

General Order 107-B
(Supersedes General Order 107-A)

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RULES AND REGULATIONS CONCERNING THE PRIVACY OF TELEPHONE COMMUNICATIONS.

Adoqpted July 1, 1983. Effective July 1, 1983.

Decision 83-06-021. 0II—Rulemaking 103.

I. REQUIRED RECORDS (Public Utilities Code §§ 7905 and 7906)

A. Each telephone corporation subject to the jurisdiction of the Commission shall maintain complete records of all instances in which employees discover any devices installed for the purpose of overhearing communications over the lines of such corporation and all instances in which employees reasonably believe and report to the corporation that a device is installed or has been installed but has since been removed.

Each such telephone corporation shall file with the Commission on or before the 31st day of March each year one copy of a report of all instances in which its employees discover any devices installed for the purpose of overhearing communications over the lines of the corporation and all instances in which employees reasonably believe and report to the corporation that a device is installed or has been installed but since been removed. This report shall cover the immediately preceding calendar year and shall include the date, name of subscriber, telephone number, location of service, nature of case, description of the device, circumstance of discovery and designation of lines involved in each discovery of these devices, by whom reported, action taken, and disposition of the case. The reports will be labeled "confidential" and will be so treated by the Commission as to details the disclosure of which, in the Commission's opinion, would be adverse to the public interest.

B. Each telephone corporation subject to the jurisdiction of the Commission shall maintain a central file available for Commission inspection of all instructions to employees, regulations, rules and forms designed to ensure the privacy and/or maintain the secrecy of communications over the lines of the corporation together with a record of the steps taken to ensure the privacy of and/or secrecy of communications.

C. Each telephone corporation shall file with the Commission on or before the 31st day of March of each year one copy of a statement showing any changes in the steps being taken to ensure privacy of and/or secrecy of communications together with one copy of any new or revised instructions, regulations, rules and/or forms being used.

D. Each telephone corporation which does not have instances during the year under Section A above and/or changes under Section C above shall file with the Commission on or before the 31st day of March each year one copy of a statement indicating it has no instances or changes during the year.

II. REGULATIONS GOVERNING MONITORING AND RECORDING

A. Monitoring or recording of telephone conversations shall not be conducted except pursuant to this General Order.

1. "Monitoring" means the use of monitoring equipment to allow a third person to overhear the telephone conversation of two or more persons. Monitoring does not include:

a. Unlawful wiretapping or eavesdropping:

b. Monitoring by law enforcement or national defense agencies, when the activity is permitted under enabling laws and legal safeguards, or by telephone utilities as provided by law to prevent fraud or loss of revenues, or to identity the source of lewd of harassing calls;

c. Accidental or unintentional interception of telephone conversations by telephone utility personnel en-

gaged in normal operation, maintenance, or construction;

d. "Administrative monitoring" or "service observing" performed by telephone utilities for training and quality control purposes, when performed as authorized by our decisions.

2. "Recording" means the recording or transcribing of any telephone conversation by means of any electronic device.

3. "Monitoring equipment" means any method or apparatus by which a public utility telephone corporation or a telephone subscriber, or any of their officers, employees, or agents, may listen to or record telephone conversations on premises owned or controlled by the utility or the subscriber:

a. Without any audible indication to the parties conversing that their conversation is being overheard, or

b. Without connection of a device to provide two-way conversation between the listener and the parties conversing so that the listener's voice may be heard throughout any period of monitoring, or

c. Without any indication to the parties conversing that their conversation is being recorded.

4. No portion of the public utility telephone network in California to which the public, or any portion of the public, has access shall be used for the purpose of transmitting any telephone conversation which is being monitored or recorded except when:

a. All the parties to the conversation give their express prior consent to the monitoring or recording, or

b. When notice that such monitoring or recording is taking place is given to the parties to the conversation by one of the methods required in this order.

5. Notice of recording shall be given either:

a. By an automatic tone warning device which shall automatically produce the distinct tone warning signal known as a "beep tone" which is audible to all parties to a communication and which is repeated at regular intervals during the course of the communication whenever the communication is being recorded; or

b. By clearly, prominently and permanently marking each telephone instrument for company use from which communications may be recorded to indicate that a communication of the user of the instrument may be recorded without notice; provided that this method of giving notice of recording may be used only if the automatic tone warning signal is audible to all parties to the communication using telephone instruments not so marked.

6. Notice of monitoring shall be given either:

a. By a tone warning device which automatically produces a distinct signal audible to all parties to a telephone conversation. The signal shall have those characteristics specified by the Federal Communications Commission, or by this order; or

b. By verbal announcement by the operator of monitoring equipment to the parties to a communication that their communication is being monitored; or

c. By a telephone instrument transmitter which is operationally connected to the communication circuit being monitored and which acoustically, mechanically, electrically or otherwise has not been designed, modified, desensitized or located with the intent of eliminating notice or monitoring or interception, with the exception that minimization of transmission losses will be permitted.

7. The tone warning signal referred to in the preceding sections shall have the following characteristics:

Number of tones	1
Length of each tone	20/100 of a second, plus or minus 20%
Pitch of tone	1,400 cycles per second, plus or minus 10%
Frequency of recurrence of each signal	not less than 12 seconds and not more than 18 seconds
Level of tone	equal to the average telephone talking signal strength

8. Each California public utility telephone corporation which offers monitoring or recording equipment to its customers shall file and maintain on file, with this Commission a tariff setting forth the requirements and restrictions for the use of this equipment.

9. All California telephone directories issued by, or under the authority of, any public utility telephone corporation shall include a description and statement of the significance of tone earning signals and marking or telephone instruments.

B. In order to assure the same degree of privacy for telephone conversations conducted over the California lines of telephone utilities interconnected with terminal equipment provided by customers of telephone utilities, each telephone utility shall file, and maintain on file, with this Commission a tariff which provides as conditions of use of the telephone network:

1. That any customer in California which provides its own terminal equipment and which monitors or records conversations between its employees and its customers, and others engaging in conversations with its employees, shall notify the telephone utility in writing of such monitoring or recording:

2. That these customers shall provide notice of the monitoring or recording by use of one of the methods authorized for equipment provided by the telephone utility; and

3. That customers using their own terminal equipment shall allow reasonable access for inspection by personnel of the telephone corporation to assure that monitoring or recording is being conducted by approved procedures.

Approved and dated June 1, 1983, at San Francisco, California.

PUBLIC UTILITIES
COMMISSION
STATE OF CALIFORNIA

By JOSEPH E. BODWITZ
Executive Director

(END OF APPENDIX A)

APPENDIX G

Decision 83-10-090 Oct. 19, 1983

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

OII-Rulemaking 103

Investigation by rulemaking instituted on the Commission's own motion concerning monitoring of telephone conversations by persons or organizations providing their own terminal equipment.

(Filed December 15, 1981)

ORDER MODIFYING DECISION (D.) 83-06-021 AND DENYING REHEARING AND FURTHER MODIFICATION THEREOF

Applications for rehearing of D.83-06-021 have been filed by Air Transport Association of America (ATA), Pacific Telephone and Telegraph Company (Pacific) and General Telephone Company of California (General). Southern California Edison Company (Edison) has filed a petition to modify D.83-06-021 in certain respects. California Teamsters Public Affairs Council has filed a response to the applications for rehearing, asking that they be denied.

We have carefully considered each and every allegation of error and request for modification in these filings and are of the opinion that good cause for granting rehearing has not been shown. However, D.83-06-021 and Appendix A thereto should be modified to more clearly set forth the basis for our jurisdiction in these matters and to establish an enforcement program consistent with others we have mandated wherein a customer's use of utility service is of concern.

As to Edison's petition, during the comment period of this rulemaking procedure Edison recommended that the exception to audible warning requirements, previously made in favor of telephone utilities, be extended to cover all utilities. This recommendation was not adopted for the reasons set forth in D.83-06-021.

Edison's petition for modification renews this request and sets forth its proposal in more detail (especially as to how customers should be notified of such monitoring). However, it raises no substantial new matter. As for the greater detail of its proposal, Edison fails to show why such material could not have been put forward during the comment period. We find that no good cause for the modification Edison requests has been shown and its petition should be denied. No further issues need be discussed. Therefore, good cause appearing,

IT IS ORDERED THAT,

1. D.83-06-021 is modified as follows:

(a) The last paragraph beginning at the bottom on page 13, mimeo and the first two paragraphs on page 14, mimeo are deleted.

(b) Parts II B.1, II B.2 and II B.3 of Appendix A are deleted in full. In their places, the following language is added:

> "1. That any customer in California which provides its own terminal equipment and which monitors or records conversations between its employees and its customers, and others engaging in conversations, where such conversations make use of the public telephone network, shall provide notice of the monitoring or recording by use of one of the methods authorized for equipment provided by the telephone utility;
>
> "2. The telephone utility shall notify the customer when it has learned of monitoring or recording which does not use one of the authorized methods of providing notice and, unless the customer will discontinue such use, Section 3 below shall apply;
>
> "3. The telephone utility shall discontinue service to a customer for noncompliance with this rule if, after written notice of at least five days, the customer has not initiated compliance with such notice. Service will be restored after the customer establishes compliance with the rule and pays the reconnection charge."

"4. Appeals Procedure. In the event of a dispute between the Company and a customer as to whether the customer is in fact in violation of provisions of Paragraph No. 1, above, or if a customer desires special relief from those provisions by reason of special hardship or impossibility of compliance, the customer may file a formal complaint with the California Public Utilities Commission in the manner provided under the Commission's Rules of Practice and Procedure. During the period the complaint is pending before the Commission the Company shall not terminate service for noncompliance."

"5. Liability of Company. The Company shall not, by taking action pursuant to this rule, be liable for any loss, damage, or injury, established or alleged, which may result or be claimed to result therefrom."

2. Rehearing of D.83-06-021, as modified herein, is denied.

3. The stay of D.83-06-021 is terminated.

4. The effective date of G.O. 107-B, as modified herein, is the date of this order.

5. Edison's petition for modification is denied.

This order is effective today.

Dated Oct. 19, 1983, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. GREY
RONALD VIAL
Commissioners

I dissent.
Leonard M.
Commissioner

I dissent.
William T. Eagley
Commissioner

No. 87-1859

Supreme Court, U.S.
FILED
JUN 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

AIR TRANSPORT ASSOCIATION OF AMERICA,
DELTA AIR LINES, INC.,
PAN AMERICAN WORLD AIRWAYS, INC.,
UNITED AIRLINES, INC., AMERICAN AIRLINES, INC.,
NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC.,
AIR CANADA, USAIR, INC. and EASTERN AIRLINES, INC.,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA; and
VICTOR CALVO, PRISCILLA C. GREW,
RONALD VIAL, LEONARD M. GRIMES, JR.,
and WILLIAM T. BAGLEY,
the members of and constituting
said Public Utilities Commission,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the failure of the Air Transport Association of America ("ATAA") to file a petition with the California Supreme Court for review of the decision of the California Public Utilities Commission ("CPUC") adopting General Order 107-B within the time prescribed by Section 1756 of the California Public Utilities Code bars it from now asserting any claim it might have raised in that petition.

LIST OF PARTIES

The parties in the court below were the Plaintiffs/Cross-Appellants/Appellees ATAA; Delta Air Lines, Inc.; Pan American World Airways, Inc.; United Airlines, Inc.; American Airlines, Inc.; Northwest Airlines, Inc.; Trans World Airlines, Inc.; Air Canada; USAir, Inc.; and Eastern Airlines, Inc. and the Defendants/Cross-Appellees/Appellants CPUC and its commissioners, Stanley W. Hulett, Donald Vial, Frederick R. Duda, G. Mitchell Wilk, and John B. Ohanian, successors in interest to the commissioners named in the petition.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	i
Table of Authorities	iii
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Cases

	Page
Air Transport Association of America v. Public Utilities Commission, 833 F.2d 200 (9th Cir. 1987)	2, 3
Allen v. McCurry, 449 U.S. 90 (1980)	4
Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal.3d 891, 160 Cal. Rptr. 124, 603 P.2d 41 (1979)	4
Federal Communications Commission v. ITT World Communications, Inc., 466 U.S. 463 (1984)	3
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	5
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	4
Migra v. Warren City School Board of Education, 465 U.S. 75 (1984)	4
Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2nd Cir. 1986)	3
Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366 (1920)	4
National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985)	3
Pacific Telephone & Telegraph Co. v. Public Utilities Commission, 600 F.2d 1309 (9th Cir. 1979), *cert. denied*, 444 U.S. 920 (1979)	4
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984)	3
People v. Western Air Lines, 42 Cal.2d 621, 268 P.2d 723 (1954), *appeal dismissed*, 348 U.S. 859 (1954)	4
Reed v. Allen, 286 U.S. 191 (1932)	5
Southern Pacific Transportation Co. v. Public Utilities Commission, 716 F.2d 1285 (9th Cir. 1984), *cert. denied*, 466 U.S. 936 (1984)	4

TABLE OF AUTHORITIES

Statutes

	Page
California Public Utilities Code:	
§ 1709	2, 4
§ 1756	2, 4
Communications Act of 1934:	
47 U.S.C. §§ 151 et seq.	3
47 U.S.C. § 202(a)	3
Federal Aviation Act of 1958:	
47 U.S.C. § 1305(a)(1)	3
Full Faith and Credit Statute:	
28 U.S.C. § 1738	2, 4

No. 87-1859

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

AIR TRANSPORT ASSOCIATION OF AMERICA,
DELTA AIR LINES, INC.,
PAN AMERICAN WORLD AIRWAYS, INC.,
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RESPONDENTS' BRIEF IN OPPOSITION

The Respondent CPUC requests that this Court deny the petition filed by the ATAA for a writ of certiorari on the ground that each of its claims is barred by the doctrine of res judicata.

OPINION BELOW

The opinion of the Court of Appeals is reported at 833 F.2d 200 (9th Cir. 1987), rather than at 833 F.2d 299 (9th Cir. 1987) as indicated in the petition.

JURISDICTION

Jurisdiction is asserted by the ATAA under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1709 of the California Public Utilities Code provides in full:

> In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Section 1756 of the California Public Utilities Code provides in pertinent part:

> Within 30 days after the commission issues its decision denying the application for a rehearing or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined.

The Full Faith and Credit Statute, 28 U.S.C. § 1738, provides in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they were taken.

STATEMENT OF THE CASE

The CPUC hereby adopts and incorporates by reference the statement of the case set forth in the opinion below at 833 F.2d at 202-203.

ARGUMENT

The opinion below, in a fair and well-reasoned manner, correctly dismissed each claim raised by the ATAA in its petition to this Court and should not be overturned. First, the Eleventh Amendment barred the District Court from exercising jurisdiction over the ATAA's claim that the CPUC had acted in excess of its authority under state law. *ATAA v. CPUC, supra*, 833 F.2d at 203-204; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). Second, General Order 107-B is entirely consistent with the requirements of Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a). *ATAA v. CPUC, supra*, 833 F.2d at 204-206; *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 737 F.2d 1095, 1133 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Third, once the ATAA filed a petition for a declaratory order with the Federal Communications Commission, the District Court lost whatever jurisdiction it may originally have had to consider the issue of preemption under the Communications Act, 47 U.S.C. §§ 151 *et seq Id.* at 206; *Federal Communications Commission v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Finally, the ATAA was without standing to assert preemption under the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, 47 U.S.C. § 1305(a)(1). *ATAA v. CPUC*, 833 F.2d at 207; *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2nd Cir. 1986).

More fundamentally, this Court should deny the petition of the ATAA for a writ of certiorari on the ground that each claim it raises is barred by the doctrine of res judicata. On June 1, 1983, the CPUC issued Decision 83-06-071, adopting General Order 107-B. Thereafter, on October 19, 1983, the CPUC issued Decision 83-10-090, denying applications filed by various parties, including the ATAA, for rehearing of Decision 83-06-071. Under Section 1756 of the California Public Utilities Code, those parties had thirty days to seek review of Decision 83-10-090 by filing a petition for a writ of certiorari with the California Supreme Court. On November 18, 1984, when no party had sought such review, that decision became final.

Federal courts are specifically required by the Full Faith and Credit Statute, 28 U.S.C. § 1738, to give the same preclusive effect to any judgment of a state court which would be given under the law of the State in which it is rendered. *Migra v. Warren City School Board of Education*, 465 U.S. 75, 80-81 (1984). Under the law of the State of California, a denial for whatever reason by the California Supreme Court, even without written opinion, of a petition to review a decision of the CPUC constitutes a judgment on the merits of all claims which were or could have been raised. *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366, 372-373 (1920); *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1289-1291 (9th Cir. 1984), *cert. denied*, 466 U.S. 936 (1984); *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 600 F.2d 1309, 1311-1312 (9th Cir. 1979), *cert. denied*, 444 U.S. 920 (1979); *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 901, 160 Cal. Rptr. 124, 603 P.2d 41 (1979); *People v. Western Air Lines*, 42 Cal.2d 621, 630-631, 268 P.2d 723 (1954); *appeal dismissed for want of a substantial federal question*, 348 U.S. 859 (1954). Furthermore, under Section 1709 of the California Public Utilities Code, final orders and decisions of the CPUC shall be conclusive in any collateral action or proceeding. *People v. Western Air Lines, supra*, 42 Cal.2d at 31. Thus, the failure of a party to file a timely petition with the California Supreme Court for review of a decision of the CPUC precludes that party from litigating in federal court any claim it might have raised. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 611, n.22 (1975). In the words of this Court,

> [T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . ."

Allen v. McCurry, 449 U.S. 90, 96 (1980); *see also Migra v. Warren City School District Board of Education, supra*, 465 U.S. at 81.

Accordingly, by its failure to file a timely petition with the California Supreme Court for review of the CPUC's Decision 83-10-090, the ATAA is barred from asserting before this Court any claim it might have raised in that petition. That the ATAA now lacks a forum in which to assert those claims in no way changes this result. It has made its choice, and now must live with the consequences:

> "The predicament in which respondent finds himself is of his own making . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Reed v. Allen*, 286 U.S., at 198-199.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401-402 (1981).

CONCLUSION

The ATAA's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 87-1859

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and constituting said Public Utilities Commission,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I

Introduction 2

II

Petitioners Initiated a Timely Attack on the Order at Issue 2

III

Conclusion 4

TABLE OF AUTHORITIES CITED

Cases

Donia v. Alcoholic Bev. Appeals Board, 167 Cal.App.3d 588, 213 Cal.Rptr. 447 (1985) 3

People v. Medina, 6 Cal.3d 481, 99 Cal.Rptr. 630, 492 P.2d 686 (1972) 3

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Air Transport Association of America, et al., submit this reply brief, in accordance with Supreme Court Rule 22.5, to respond to the arguments first raised in the opposition brief filed by respondents The Public Utilities Commission of the State of California ("CPUC") and its Commissioners.

I

INTRODUCTION

Because respondents simply restate the rulings of the Ninth Circuit on the points raised by the petition, and apparently have no answer to petitioner's arguments concerning the constitutional and statutory questions raised by the Ninth Circuit's rulings, petitioners are not presented with any arguments on the "questions presented" requiring a response. Respondents do raise, however, a spurious "res judicata" argument which petitioners will address below.

II

PETITIONERS INITIATED A TIMELY ATTACK ON THE ORDER AT ISSUE

Respondents suggest that, because petitioners did not file a petition for certiorari in the California Supreme Court within thirty days of the CPUC's adoption of General Order 107-B, petitioners somehow are barred by the doctrine of "res judicata" from filing a petition in this Court. This curious agrument, never made before in the five-year history of this litigation, is nonsensical legally[1] and is based on a half-truth.

Although it is true that petitioners did not file a petition for a writ of certiorari in the California Supreme Court attacking the CPUC's adoption of G.O. 107-B, petitioners *did* attack G.O. 107-B, on both state and federal grounds, by filing this action in the United States District Court on November 18, 1983. Because the CPUC's final order adopting G.O. 107-B was entered on October 19, 1983 (App. G), all of petitioners claims—their state law claims as well as their federal law claims—were initiated within thirty days. Consequently, they were timely under all arguable

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[1] How a failure to file a claim within a period allowed by a statute of limitations could constitute a "judgment" entitled to res judicata effect or "full faith and credit" is nowhere explained and makes no legal sense. G.O. 107-B itself is not an adjudication of a claim; it is the action of the CPUC that violates petitioners' federal and state law rights.

limitations periods. Respondents' failure ever to argue in either the district court or the Court of Appeals that any of petitioners' claims were not presented in a timely manner demonstrates even further the spurious nature of their argument.

Furthermore, because petitioners chose to attack the CPUC's order on both federal and state grounds in federal court, and therefore did not initiate parallel proceedings in the California Supreme Court, the California Supreme Court never considered and never denied a petition for certiorari in this matter. Consequently, there is no state court judgment upon which a res judicata finding could be premised, and all of the authorities cited in the CPUC's brief are inapposite.[2]

In sum, the CPUC's "res judicata" argument has no basis in law or fact and does not establish a reason for denying certiorari on the issues presented in the petition. It simply constitutes another in an unbroken series of efforts by respondents to avoid a

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[2] At one point in the proceedings before the district court, the court afforded the California Supreme Court an opportunity to assume jurisdiction over the state law claims when it dismissed those claims without prejudice, stayed entry of judgment, and allowed petitioners time to ask the state supreme court to allow the filing of a petition raising the respective issues. The California Supreme Court declined this opportunity to assume jurisdiction over the matter when the CPUC argued, *inter alia*, that the issues already were being litigated in the federal court and that petitioners would "have their day in court" in that forum. Only thereafter did the district court finally decide the issues now before this Court in petitioners' favor. An argument by the CPUC that the state supreme court's failure to assume jurisdiction barred further action in the district court was fully briefed in the district court and unequivocally resolved against the CPUC. (App. C, at C-7). The Ninth Circuit did not even address the question. (App. A, at A-13n.9) Also, no case or other authority cited by respondents indicates that a state court's discretionary refusal to assume jurisdiction over an issue has res judicata effect under any state or federal principle of law. Indeed, even California Supreme Court denials of petitions for certiorari taken from an administrative agency's orders have res judicata effect *only* when they are based on the *merits* of the petition. *Donia v. Alcoholic Bev. Appeals Board*, 167 Cal.App.3d 588, 594, 213 Cal.Rptr. 447 (1985); *People v. Medina*, 6 Cal.3d 481, 491n.6, 99 Cal.Rptr. 630, 492 P.2d 686 (1972).

decision on the merits in every forum that has considered this matter, a tactic that eventually failed in the district court but which succeeded in the Ninth Circuit to an extent that has made the present petition necessary.

III

CONCLUSION

The Ninth Circuit's decision in this case raises substantial constitutional questions and interprets two important federal statutes in a manner that significantly impairs the rights the statutes secure and the federal interests they are intended to promote. The Court of Appeal's rulings certainly will have an impact far beyond their immediate effect on petitioners and this litigation. Consequently, this petition presents important federal questions that deserve this Court's attention.

Dated: June 17, 1988.

Respectively submitted,
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